

OPEN HEARING ON FISA LEGISLATION

HEARING
BEFORE THE
SELECT COMMITTEE ON INTELLIGENCE
OF THE
UNITED STATES SENATE
ONE HUNDRED FIFTEENTH CONGRESS
FIRST SESSION

WEDNESDAY, JUNE 7, 2017

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CONTENTS

JUNE 7, 2017

OPENING STATEMENTS

Burr, Hon. Richard, Chairman, a U.S. Senator from North Carolina	1
Warner, Hon. Mark R., Vice Chairman, a U.S. Senator from Virginia	2

WITNESSES

Coats, Hon. Dan, Director of National Intelligence; Accompanied by: Andrew McCabe, Acting Director, Federal Bureau of Investigation; Admiral Michael S. Rogers (USN), Director, National Security Agency, and Commander, U.S. Cyber Command; and Rod J. Rosenstein, Deputy Attorney General	4
Prepared Statement	11

OPEN HEARING ON FISA LEGISLATION

WEDNESDAY, JUNE 7, 2017

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, DC.

The Committee met, pursuant to notice, at 10:08 a.m. in Room SH-216, Hart Senate Office Building, Hon. Richard Burr (Chairman of the Committee) presiding.

Committee Members Present: Senators Burr (presiding), Warner, Risch, Rubio, Collins, Blunt, Lankford, Cotton, Cornyn, McCain, Feinstein, Wyden, Heinrich, King, Manchin, Harris, and Reed.

OPENING STATEMENT OF HON. RICHARD BURR, CHAIRMAN, A U.S. SENATOR FROM NORTH CAROLINA

Chairman BURR. I'd like to thank our witnesses today: Director of National Intelligence Dan Coats—Dan, welcome back to your family here in the United States Senate—Department of Justice Deputy Attorney General Rod Rosenstein; Director of National Security Agency Admiral Mike Rogers; and Acting Director of the Federal Bureau of Investigation Andrew McCabe. Welcome to all four of you.

I appreciate you coming today to discuss one of our most critical and publicly debated foreign intelligence tools. Title VII of the Foreign Intelligence Surveillance Act, commonly known as FISA, is set to expire on December 31, 2017. Title VII includes several crucial foreign intelligence collection tools, including one known primarily as Section 702. Section 702 provides the capability to target foreigners who are located outside the United States, but whose foreign communications happen to be routed to and acquired inside the United States.

Section 702 collection is exceptionally critical to protecting Americans both at home and abroad. It is integral to our foreign intelligence reporting on terrorist threats, leadership plans, intentions, counterproliferation, counterintelligence, and many other issues that affect us.

It is subject to multiple layers of oversight and reporting requirements from the Executive, the Judicial and the Legislative Branches. The Foreign Intelligence Surveillance Court must approve minimization procedures for each relevant IC agency before the agency can review collected information. At the end of the day, FISA collection provides our government with the foreign intelligence that our Nation needs to protect Americans at home and abroad, and in many cases our allies.

I understand there is an ongoing debate pitting privacy against national security, and there are arguments within the debate that have merit.

As we all too painfully know, the intelligence community's valuable FISA collection was thrust into the public spotlight following the illegal and unauthorized disclosures by former NSA analyst Edward Snowden. As a result, the United States government and this committee redoubled its efforts to oversee FISA collection authorities, which already were subject to historical robust oversight.

But I also think it's fair to say that some entities overreacted following Snowden's disclosures. And now Congress must justify what courts repeatedly have upheld as constitutional and lawful authorities. And I also think that it's fair to say that nothing regarding this lawful status has changed since Director Clapper and Attorney General Holder wrote to Congress in February 2012 to urge us to pass a straight reauthorization of FISA, and since the Obama Administration followed suit in September 2012.

What has changed, however, is the intensity, scale and scope of the threats that face our Nation. This is not the time to needlessly roll back and handicap our capabilities. I know a lot of people will use this hearing as an opportunity to talk about the committee's Russian investigation. I'd like to remind everyone that 702 is one of our most effective tools against terrorism and foreign intelligence targets. I hope my colleagues and those closely watching this hearing realize that, at the end of the day, our constitutional obligation is to keep America and our citizens safe.

The intelligence community needs Section 702 collection to successfully carry out its mission. And it is this committee's obligation to ensure that the IC has the authorities and the tools it needs to keep us safe at home and abroad.

Gentlemen, I look forward to your testimony and continued efforts to maintain the integrity of this vital collection tool.

I now turn to the Vice Chairman for any comments he might have.

**OPENING STATEMENT OF HON. MARK WARNER, U.S. SENATOR
FROM VIRGINIA**

Vice Chairman WARNER. Thank you, Mr. Chairman. And thank you for hosting this hearing on the very important 702 program and ways that we might ensure its effectiveness, and I will get to that in a moment. However, given the panel of witnesses here and given the recent news about ongoing investigations into Russian interference in our 2016 elections, I'm going to have to take at least part of my time to pose some questions during my question time.

Each of you here today, we all know, have taken oaths to defend the Constitution. As leaders of the intelligence community, you've also committed to act and to provide advice and counsel in a way that is unbiased, impartial, and devoid of any political considerations. This is the essence, quite honestly, of what makes our intelligence community and all the men and women who work for you so impressive. You tell it straight, no matter which political party is in charge.

And that's why it's so jarring to hear recent reports of White House officials, perhaps even the President himself, attempting to

interfere and enlist our intelligence community leaders in any attempt to undermine the ongoing FBI investigation.

Obviously, tomorrow there's another big hearing. We'll be hearing from former FBI Director Comey. I imagine he'll have something to say about the circumstances surrounding his dismissal. We have now heard the President himself say that he was thinking about the Russia investigation when he fired Director Comey, the very individual who was overseeing that same investigation.

Today we'll have an opportunity to ask Deputy Attorney General Rosenstein about his role in the Comey firings as well. Additionally, we've seen reports, some as recently as yesterday, that the President asked at least two of the leaders of our Nation's intelligence agencies to publicly downplay the Russian investigation. The President is alleged to have also personally asked Director Coats and CIA Director Pompeo to intervene directly with then Director Comey to pull back on his investigation.

I'll be asking, as I've told them, DNI Director Coats and NSA Director Admiral Rogers about those reports today, because if any of this is true, it would be an appalling and improper use of our intelligence professionals, an act, if true, that could erode the public's trust in our intelligence institutions.

The IC, as I've grown to know over the last seven and a half years I've been on this committee, prides itself, appropriately, on its fierce independence. Any attempt by the White House or even the President himself to exploit this community as a tool for political purposes is deeply, deeply troubling.

I respect all of your service to the Nation. I understand that answering some of the questions that the panel will pose today may be difficult or uncomfortable, given your positions in the Administration. But this issue is of such great importance, the stakes are so high, I hope you will also consider all of our obligation to the American people, to make sure that they get the answers they deserve to so many questions that are being asked.

Now let me return to the subject of our hearing. Mr. Chairman, I agree that the reauthorization of Section 702 is terribly important. As the attacks in London, Paris, Manchester, Melbourne—and the list unfortunately goes on and on—all those attacks have demonstrated, terrorists continue to plot attacks that target innocent civilians. Section 702 under court order collects intelligence about these potential terrorist plots.

It authorizes law enforcement and the intelligence community to collect intelligence on non-U.S. persons outside the United States, where there is reasonable suspicion that they seek to do us harm.

I've been a supporter of reauthorizing Section 702 to protect Americans from terrorist attacks. And I'm eager to work with my colleagues on both sides of the aisle to make sure that we reauthorize it before the end of this year. A reauthorization of Section 702 should ensure also that there is robust oversight and restrictions to protect the privacy and civil liberties of Americans. Those protections remain in place, and if there are areas where those protections can be strengthened, we ought to look at those, as well.

So thank you, Mr. Chairman. I look forward to our hearing.
Chairman BARR. Thank you, Vice Chairman.

Let me say for all members, votes are no longer scheduled for 10:30, if you've not gotten that word. Votes have been moved to 1:45. When this hearing adjourns, we will reconvene at 2:00 p.m. for a closed-door session on Section 702. I intend to start that hearing promptly at 2:00. Today, members will be recognized by seniority for questions up to five minutes.

With that, gentlemen, thank you for being here today. Director Coats, you are recognized to give testimony on behalf of all four of you. The floor is yours.

STATEMENT OF HON. DAN COATS, DIRECTOR OF NATIONAL INTELLIGENCE; ACCOMPANIED BY: ANDREW McCABE, ACTING DIRECTOR, FEDERAL BUREAU OF INVESTIGATION; ADMIRAL MICHAEL S. ROGERS (USN), DIRECTOR, NATIONAL SECURITY AGENCY, AND COMMANDER, U.S. CYBER COMMAND; AND ROD J. ROSENSTEIN, DEPUTY ATTORNEY GENERAL

Director COATS. Thank you, Mr. Chairman. Chairman Burr, Chairman Warner, members of the committee: We are pleased to be here today, at your request, to talk about an important and perhaps the most important piece of legislation that affects the intelligence community. I'm here with my colleagues.

I would like to take the opportunity to explain in some detail Section 702, given this is a public hearing and hopefully the public will be watching. Our efforts to provide transparency in terms of how we protect the privacy and civil liberties of our American citizens needs to be explained. The program needs to be understood, and so I appreciate your patience as I talk through in my opening statement the value of 702 to our intelligence community and to keeping Americans safe.

Intelligence collection under Section 702 of the FISA Amendments has produced and continues to produce significant intelligence that is vital to protect the Nation against international terrorism, against cyber threats, weapons proliferators and other threats. At the same time, Section 702 provides strong protections for the privacy and civil liberties of our citizens.

Today, the horrific attacks that recently have occurred in Europe are still at the top of my mind. I was just in Europe days before the first attack in Manchester, followed by other attacks that have subsequently taken place. I was in discussion with my British colleagues through this, as well as colleagues in other European nations. And my sympathies go out to the victims and families of those that have received these heinous attacks and to the incredible resilience that these communities affected by this violence have shown.

Having just returned from Europe less than three weeks ago, I'm reminded of why Section 702 is so important to our mission of not only protecting American lives, but the lives of our friends and allies around the world. And although the many successes enabled by 702 are highly classified, the purpose of the authority is to give the United States intelligence community the upper hand in trying to avert these types of attacks before they transpire, which is why permanent reauthorization of the FISA Amendments Act without further amendment is the intelligence community's top legislative priority.

And based on the long history of oversight and transparency of this authority, I would urge the Congress to enact this legislation at the earliest possible date, to give our intelligence professionals the consistency they need to maintain our capability.

Let me begin today by giving an example of the impact of Section 702 of FISA. It's been cited before, but I think it is worth mentioning again. An NSA FISA Section 702 collection against an e-mail address used by an Al Qaida courier in Pakistan revealed communications with an unknown individual located within the United States. The U.S.-based person was urgently seeking advice on how to make explosives.

NSA passed this information on to the FBI, which in turn was able to quickly identify the individual as Najibullah Zazi. And as you know, Zazi and his associates in fact had imminent plans to detonate explosives on Manhattan's subway lines.

After Zazi and his coconspirators were arrested, the Privacy and Civil Liberties Oversight Board stated in its report, and I quote, "Without the initial tipoff about Zazi and his plans, which came about by monitoring an overseas foreigner under Section 702, the subway bombing plot might have succeeded." This is just one example out of many of the impacts this authority has had on the IC's ability to thwart imminent threats and plots against United States citizens and our friends and allies overseas.

Since it was enacted nearly 10 years ago, the FISA Act has been subject to rigorous and constant oversight by all three branches of government. Indeed, we regularly report to the Intelligence and Judiciary Committees of both the House and the Senate how we have implemented the statute, the operational value it has afforded, and the extensive measures we take to ensure that the government's use of these authorities complies with the Constitution and the laws of the United States.

Further, over the past few years we have engaged in an unprecedented amount of public transparency on the use of these authorities. In the interest of transparency and because this is a public hearing, allow me to provide an overview of the framework for Section 702 and the reasons why the Congress amended FISA in 2008.

I will then briefly address why 702 needs to be reauthorized. And finally, I will discuss oversight and compliance, and how we are ensuring and continue to ensure the rights of U.S. citizens, rights that need to be protected.

At the outset, I want to stress three things as a backdrop to everything else that my colleagues and I are presenting today. First, as I mentioned at the outset, collection under 702 has produced and continues to produce intelligence that is vital to protect the Nation against international terrorism and other threats.

Secondly, there are important legal limitations found within Section 702 of FISA and let me note four of these legal limitations. First, the authorities granted under Section 702 may only be used to target foreign persons located abroad for foreign intelligence purposes. Secondly, they may not be used to target U.S. persons anywhere in the world. Third, they may not be used to target anyone located inside the United States, regardless of their nationality. And fourth, they may not be used to target a foreign person when the intent is to acquire the communications of a U.S. person with

whom a foreign person is communicating. This is generally referred to as the prohibition against reverse targeting.

The third item I would like to stress is that we are committed to ensuring that the intelligence community's use of 702 is consistent with the law and the protection of the privacy and civil liberties of Americans. And to that end, in the nearly 10 years since Congress enacted the FAA, there have been no instances of intentional violations of Section 702. I'd like to repeat that. In the nearly 10 years since Congress enacted the amendments to the Freedom Act, the act that established FISA, there have been no instances of intentional violations of Section 702.

With those points as a backdrop, now let me turn to a discussion of why it became necessary for Congress to enact Section 702. I do this so that the American public can hopefully better understand the basis for this important law.

The Foreign Intelligence and Surveillance Act was first passed in 1978, creating a way for the Federal Government to obtain court orders for electronic surveillance of suspected spies, terrorists, and foreign diplomats located inside the United States. When originally enacting FISA, Congress decided that collection against targets located abroad would generally be outside of their regime, FISA's regime. That decision reflected the fact that people in the United States are protected by the Fourth Amendment, while foreigners located abroad are not. Congress accomplished this in large part by defining electronic surveillance based on the technology of the time. In the 1970s, overseas communications were predominantly carried by satellite. FISA, as passed in 1978, did not require a court order for the collection of these overseas satellite communications.

So, for example, if in 1980 NASA intercepted a satellite communication of a foreign terrorist abroad, no court order was required. However, by 2008 technology had changed considerably. First, U.S.-based e-mail services were being used by people all over the world.

Second, the overseas communications that in 1978 were typically carried by satellite were now being carried by fiber optic cables, often running through the United States. So, to continue the same example, if in 2008 a foreign terrorist was communicating by using a U.S.-based e-mail service, a traditional FISA court order was required to compel a U.S.-based company to help with that collection.

Under traditional FISA, a court order can only be obtained on an individual basis, by demonstrating to a Federal judge that there is probable cause to believe that the target of the proposed surveillance is a foreign power or an agent of a foreign power. This had become an ever more difficult and extremely resource-intensive process.

And therefore, due to these changes in technology, the same resource-intensive legal process was being used to conduct surveillance on terrorists located abroad, who are not protected by the Fourth Amendment, as was being used to conduct surveillance on U.S. persons inside the United States, who are protected by the Fourth Amendment.

By enacting 702 in 2008 and renewing it in 2012, both times with significant bipartisan support, Congress corrected this anomaly, restoring the balance of protections established by the original

FISA statute. And although I will not go into great detail here regarding the legal framework for FISA's Section 702, I will simply note a few key items.

First, the statute requires annual certifications by the Attorney General and by the Director of National Intelligence regarding the categories of foreign intelligence that the intelligence community will acquire under this authority.

Second, the statute requires targeting procedures that set forth the rules by which the intelligence community ensures that only foreign persons abroad are targeted for collection.

Thirdly, the statute requires minimization procedures protecting U.S. persons' information that may be incidentally acquired while targeting foreign persons.

And finally, each year the FISA Court reviews this entire package of material to make sure the government's program is consistent with both the statute and with the Fourth Amendment of the Constitution.

We have publicly released lightly redacted versions of all these documents, including the most recent FISC opinion, to ensure the public has a good understanding of how we use this authority. The government's Section 702 program, as we have said, is subject to rigorous and frequent oversight by all three branches of government.

The first line of oversight and compliance is within the agencies themselves, whose offices of general counsel, privacy and civil liberties offices, and inspectors general all have a role in FISA 702 program oversight. The majority of the incidents of noncompliance that are reported to my office and to the Department of Justice are self-reported by the participating agencies.

In addition, the Office of the DNI and Department of Justice conduct regular audits, focusing on compliance with the targeting procedures, as well as on querying of collected data and on dissemination of information under the minimization procedures. Also, we have regular engagements with and extensive reporting to Congress about the FISA 702 program.

For example, the Judiciary and Intelligence Committees receive relevant orders of the FISA Court and associated pleadings, descriptions and analysis of every compliance incident, and certain statistical information, such as the number of intelligence reports in which a known U.S. person was identified.

And finally, of course, the FISA Court regularly checks our work, both through the annual recertification process and through regular interactions on particular incidents of noncompliance. Members of the FISA Court, who are all appointed by the Chief Justice of the Supreme Court, represent the best of the best of our judicial community. They have vast judicial experience and are committed to the constitutional responsibilities of protecting the privacy of U.S. persons.

We are particularly proud of our oversight and compliance track record. The audits of the program conducted by the ODNI and DOJ have shown that unintended error rates are extremely low, substantially, substantially less than 1 percent.

Further, and I want to emphasize this, we have never—not once—found an intentional violation of this program. There have

been unintended mistakes, but I would note that any system with zero compliance incidents is a broken compliance system, because human beings make mistakes. The difference here is that none of these mistakes has been intentional. When do we—and when we do find unintentional errors and compliance incidents, we ensure that they are reported and corrected.

This is an extraordinary record of success for the diligent men and women of the intelligence community, who are committed to ensuring that their neighbors' privacy is protected in the course of their national security work.

And with that, I'd like to turn to the most recent compliance incident, which resulted in a significant change in how the National Security Agency conducts a portion of its FISA 702 collection. A recent example of the oversight process at work—as a recent example, NSA identified a compliance incident involving queries of U.S. persons' identifiers into Section 702-acquired upstream data. "Upstream data" refers to when NSA receives communications directly from the Internet, with the assistance of companies that maintain these backbone networks. The FISC, FISA Court, was promptly notified and DOJ and ODNI worked with NSA to understand the scope and causes of the problem, as well as to identify potential solutions to prevent the problem from reoccurring.

The details of the incident are publicly available, and Admiral Rogers will go or can go into more detail during the question and answer session if you would like. But just allow me briefly to state what happened. NSA identified and researched a compliance issue.

NASA—excuse me. NSA reported that issue to DOJ, ODNI, and ultimately the FISA Court. The court delayed its consideration of the 2016 certifications on that basis until the government was able to correct the issue.

NSA determined that a possible solution to the compliance problem was to stop conducting one specific type of upstream collection. So ultimately we decided that the most effective way to address the court's concerns was to stop collecting on this basis. It's called the "abouts" portion of upstream collection. And by "abouts collection," I'm referring to NSA's ability to collect communications where the foreign intelligence target is neither the sender nor the recipient of the communication that's made, but is referenced within the communication itself. The FISA Court agreed with our solution and approved the program as a whole on the basis of the NSA proposal.

In short, what I'm trying to say here is that a compliance issue was identified and after a great deal of hard work the Department of Justice and the intelligence community proposed to the FISA Court an effective solution that took the relevant collection costs and compliance benefits into account, and the court agreed with the proposed solution. That is how the process works, and it works well.

Before I conclude, I would like to speak briefly about an issue that has been the subject of much public discussion. There have been requests, numerous requests, from both Congress and the advocacy community for NSA to attempt to count the number of United States persons whose communications have been incidentally acquired in the course of FISA 702 collection. During my confirmation hearing and in a subsequent hearing before this com-

mittee, I committed to sitting down with Admiral Rogers and the subject matter experts in the intelligence community to understand why this has been so difficult.

Within my first few weeks on the job, I visited NSA, discussed with Admiral Rogers and his technical people, and followed through on my commitment. What I learned was that the NSA has made—it's hard for me to say. They have made extensive efforts.

[Laughter.]

“Herculean” I think is the—say that again.

Mr. ROSENSTEIN. Herculean.

Director COATS. Herculean. Herculean. All right. I had to turn to—

Senator RISCH. We know what you mean.

Director COATS. You know what I mean? I mean really tough efforts, all right, to devise a counting strategy that would be accurate and that would respond to the question that was asked. But I also learned that it remains infeasible to generate an exact, accurate, meaningful, and responsive methodology that can count how often a U.S. person's communications may be incidentally collected under 702.

I want to be clear here. To determine if communicants are U.S. persons, NSA would be required to conduct significant additional research trying to determine whether individuals who may be of no foreign intelligence interest are U.S. persons. And from my perspective as the Director of National Intelligence, this raises two significant concerns.

First, I would be asking trained NSA analysts to conduct intense identity verification research on potential U.S. persons who are not targets of an investigation. From a privacy and civil liberties perspective, I find this unpalatable.

Second, those scores of analysts that would have to be shifted from key focus areas such as counterterrorism, counterintelligence, counterproliferation, issues with nations in which, such as North Korea, we need—and Iran—we need continuous and critical intelligence missions. I can't justify such a diversion of critical resources and the mass of critical resources that we would need to try to attempt to reach this, even without the ability to reach a definite number. I can't justify that at a time when we face such a diversity of serious threats.

And finally, even if we decided the privacy intrusions were justified, and if I had unlimited staff to tackle this problem, we still do not believe it is possible to come up with an accurate, measurable result.

I'm aware that the Senate Intelligence Committee staff will be meeting following this public hearing in a classified session, and Admiral Rogers has instructed his experts to address this issue in greater detail.

Before I wrap up my remarks, I want to provide one final example that I have, for the purposes of today's hearing, chosen to declassify using my authority as the Director of National Intelligence to further illustrate the value of Section 702. Before rising through the ranks to become at one point the second in command of the self-proclaimed Islamic State of Iraq and al-Sham, ISIS, Haji Iman was a high school teacher and imam. His transformation from cit-

izen to terrorist caused the U.S. government to offer a \$7 million reward for information leading to him.

It also made him a top focus of the NSA's counterterrorism efforts. NSA, along with its IC partners, spent over two years, from 2014 to 2016, looking for Haji Iman. This search was ultimately successful, primarily because of FISA Section 702. Indeed, based almost exclusively on intelligence activities under Section 702, NSA collected a significant body of foreign intelligence about the activities of Haji Iman and his associates.

Beginning with non-Section 702 collection, NSA learned of an individual closely associated with Haji Iman. NSA used collection permitted and authorized under Section 702 to collect intelligence on the close associates of Haji Iman, which allowed NSA to develop a robust body of knowledge concerning the personal network of Haji Iman and his close associates.

Over a two-year period, using FISA Section 702 collection and in close collaboration with our IC partners, NSA produced more intelligence on Haji Iman's associates, including their location. NSA and its tactical partners then combined this information, the Section 702 collection which was continuing and other intelligence assets, to identify the reclusive Haji Iman and track his movements.

Ultimately, this collaboration enabled U.S. forces to attempt an apprehension of Haji Iman and two of his associates. On March 24th, 2016, during the attempted apprehension operation, shots were fired at the U.S. forces aircraft from Haji Iman's location. U.S. forces returned fire, killing Haji Iman and the other associates at that location. Subsequent Section 702 collection confirmed Haji Iman's death.

As you can see from this sensitive example, Section 702 is an extremely valuable intelligence collection tool and one that is subject to a rigorous, effective oversight program. And therefore, allow me to reiterate my call on behalf of the intelligence community without hesitation, my call for permanent reauthorization of the FISA Amendments Act without further amendment.

Mr. Chairman, thank you for your patience and we would be willing to be open to your questions.

[The prepared statement of Director Coats follows:]

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**JOINT STATEMENT FOR THE RECORD
SENATE SELECT COMMITTEE ON INTELLIGENCE**

**DANIEL R. COATS
DIRECTOR OF NATIONAL INTELLIGENCE**

**MICHAEL ROGERS
DIRECTOR, NATIONAL SECURITY AGENCY**

**ROD J. ROSENSTEIN
DEPUTY ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

AND

**ANDREW MCCABE
ACTING DIRECTOR
FEDERAL BUREAU OF INVESTIGATION**

JUNE 7, 2017

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JOINT STATEMENT FOR THE RECORD

7 June 2017

INTRODUCTION

(U) Chairman Burr, Vice Chairman Warner, distinguished members of the Committee, thank you for the opportunity to brief you today about the FISA Amendments Act (FAA), which is set to sunset at the end of this year, and particularly to discuss Section 702.

(U) The FAA provides authorities that the Intelligence Community uses to collect information about international terrorists and other foreign intelligence targets located outside the United States. It has proved to be a critical legal authority to protect our national security. The FAA, in particular Section 702 authority, has also been the subject of extensive oversight and review by all three branches of Government, as well as a comprehensive review conducted in 2014 by the independent Privacy and Civil Liberties Oversight Board (PCLOB). These reviews have universally concluded that the Government is properly using this authority to conduct foreign intelligence collection; no review has identified a single intentional violation of the law. **Given the importance of Section 702 to the safety and security of the American people, the Administration urges Congress to reauthorize Title VII of the FAA promptly and without a sunset provision.**

(U) We begin by discussing Section 702 of the Foreign Intelligence Surveillance Act (FISA), the provision that permits targeted surveillance for intelligence purposes of foreign persons located outside the United States with the assistance of U.S. electronic communication service providers. We describe the importance of Section 702 to our national security and give examples of its value in protecting against a variety of threats. A number of further specific examples of the substantial value generated by Section 702 collection will be provided in a classified context. Additionally, we summarize how Section 702 works, how the Intelligence Community has implemented it, the extensive oversight of its use, and our transparency efforts to better inform the American public of the scope and protections of this program. We also describe the results of several independent oversight reviews of the Government's use of Section 702, as well as additional protections that have been added in the last several years. Next, we briefly describe other changes to FISA made by the FAA, including section 704, which provides increased protections for Americans' civil liberties by requiring orders from the Foreign Intelligence Surveillance Court (FISC) before the Government may engage in certain kinds of intelligence collection targeting U.S. persons located outside the United States. Prior to the FAA, the Attorney General could authorize such collection without a court order; the FAA added additional protections for U.S. persons by requiring this collection to be authorized by the FISC. Finally, we describe our efforts to facilitate congressional oversight of the FAA.

(U) This Committee plays an important role in overseeing these critical surveillance authorities. We are pleased to provide the Committee with the information it needs regarding the Government's use of these authorities. After hearings and extensive review of the Government's use of these

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surveillance powers, Congress reauthorized the FAA in 2012. We believe that the Committee will continue to agree that the Government has exercised these authorities in an appropriate manner that respects Americans' privacy and civil liberties, while also obtaining foreign intelligence information necessary to protect our national security.

(U) I. The Importance of Section 702 Collection

(U) Collection conducted under Section 702 has produced and continues to produce foreign intelligence information that is vital to protect the nation against international terrorism and other threats. It provides information about the plans and intentions of our adversaries, allowing us to peer inside their organizations and obtain information about how they function and receive support.

(U) The Administration believes that Section 702 provides critical foreign intelligence that cannot practicably be obtained through other methods. To require an individualized court order before acquiring the communications of a foreign terrorist or other foreign intelligence target overseas would have serious adverse consequences. First, in some cases it would likely prevent the acquisition of important foreign intelligence information. The Intelligence Community may not meet the relatively high evidentiary standard of probable cause that an individual targeted under Section 702 is an "agent of a foreign power," as defined in Title I of FISA, even though the Intelligence Community may assess he or she is likely to be communicating foreign intelligence information. Probable cause should not be required in such cases because, as courts have repeatedly held, non-U.S. persons outside the United States do not enjoy the protections of the Fourth Amendment. Second, even as to those targets who otherwise meet the probable cause standard under Title I of FISA, eliminating Section 702's more agile targeting requirements would significantly slow the Intelligence Community's ability to acquire important foreign intelligence information in a timely manner. Third, because of the number of Section 702 selectors, it is simply not practical to obtain individualized orders on a routine basis. The burden of seeking tens of thousands of individual court orders would overwhelm the Executive and Judicial Branches, an untenable result given the lack of a requirement to seek such orders under the Fourth Amendment.

(U) Section 702 collection is a major contributor to NSA's reporting on counterterrorism, counterintelligence and other national security topics. Since its enactment in 2008, the number of signals intelligence reports issued by NSA, based at least in part on Section 702 collection, has grown exponentially. CIA and FBI have similarly acquired highly valuable and often unique intelligence through Section 702 collection. Numerous real-life examples that demonstrate the broad range of important information that the Intelligence Community has obtained can be provided to the Committee in a classified setting. While examples that identify specific targets and operations must remain classified, the following three declassified examples provide a sampling of the many contributions Section 702 has made to our national security.

- NSA, over a two-year period, used Section 702 to develop a robust body of knowledge about the personal network of an individual providing support to a leading terrorist in Iraq and Syria. This "leading terrorist" practiced strict operational security, and thus it was necessary to study the target by identifying key operatives throughout his network to understand not only the plans and intentions of the terrorist leader, but also to attempt to track his

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movements. Section 702 collection provided the necessary information for tactical teams to conduct a successful military operation, removing the terrorist from the battlefield. This information was critical to the discovery and disruption of this threat to the U.S. and its Allies.

- Based on FISA Section 702 collection, CIA alerted a foreign partner to the presence within its borders of an al-Qaeda sympathizer. Our foreign partner investigated the individual and subsequently recruited him as a source. Since his recruitment, the individual has continued to work with the foreign partner against al-Qaeda and ISIS affiliates within the country.
- CIA has used FISA Section 702 collection to uncover details, including a photograph, that enabled an African partner to arrest two ISIS-affiliated militants who had traveled from Turkey and were connected to planning a specific and immediate threat against U.S. personnel and interests. Data recovered from the arrest enabled CIA to learn additional information about ISIS and uncovered actionable intelligence on an ISIS facilitation network and ISIS attack planning.

(U) The PCLOB's comprehensive and independent review of the Section 702 program concurred with the Administration's assessment of the value of the program. Privacy and Civil Liberties Oversight Board, *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act*, July 2, 2014 (hereinafter "PCLOB Report"). As the Board noted, in addition to disrupting specific plots at home and abroad, Section 702 collection "has proven valuable in a number of ways to the government's efforts to combat terrorism. It has helped the United States learn more about the membership, leadership structure, priorities, tactics, and plans of international terrorist organizations. It has enabled the discovery of previously unknown terrorist operatives as well as the locations and movements of suspects already known to the government." PCLOB Report at 107. The Board further acknowledged the Section 702 program's value in acquiring other foreign intelligence information, examples of which can be provided in a classified setting.

(U) **II. Overview of Section 702**(U) **Legal Requirements**

(U) Many terrorists and other foreign intelligence targets abroad use communications services based in this country, especially those provided by U.S.-based Internet service providers (ISPs). Even where a U.S.-based service provider is not used, the communications of a target overseas may transit this country. Before the enactment of Section 702, when the Intelligence Community wanted to collect these communications, it was often confronted with a dilemma. When FISA applied to the collection of such communications from a provider in the United States, the Government had to obtain a court order to obtain such communications. Before the Foreign Intelligence Surveillance Court (FISC) may issue a traditional FISA order, the statute requires a finding of probable cause that the target is a foreign power or an agent of a foreign power and that the target is using or about to use the targeted facility, such as a telephone number or e-mail account. The Attorney General, and subsequently the FISC, must approve each individual application. The Constitution does not require this practice, and it proved to be extraordinarily burdensome to require individual court orders for intelligence collection aimed at non-U.S. persons abroad. We know of no other countries that

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require court orders to authorize intelligence activities targeting foreigners outside their countries.

(U) In 2008, Congress addressed this issue by enacting the FAA, within which Section 702 authorizes the Government to collect with the assistance of providers in the United States, communications of non-U.S. persons located outside the United States to acquire foreign intelligence information. At the same time, Section 702 provides a comprehensive regime of oversight by all three branches of Government to protect the constitutional and privacy interests of Americans.

(U) Under Section 702, instead of issuing individual orders, the FISC approves annual certifications submitted by the Attorney General and the Director of National Intelligence (DNI) that specify categories of foreign intelligence that the Government is authorized to acquire pursuant to Section 702. Section 702 contains a number of statutory protections regarding these certifications to ensure that the resulting targeting is properly aimed at non-U.S. persons located outside the United States who are assessed to possess, expected to receive, or are likely to communicate foreign intelligence information that falls within one of those categories. First, the Attorney General and the DNI must certify that a significant purpose of an acquisition is to obtain foreign intelligence information. Second, an acquisition may only intentionally target non-U.S. persons. Third, the Government may not intentionally target any person known at the time of the acquisition to be in the United States. Fourth, the Government may not target someone outside the United States for the purpose of targeting a particular, known person in this country. Fifth, Section 702 protects domestic communications by prohibiting the intentional acquisition of "any communication as to which the sender and all intended recipients are known at the time of the acquisition" to be in the United States. Finally, of course, any acquisition must be consistent with the Fourth Amendment. The certifications are the legal basis for targeting specific non-U.S. persons outside the United States and, based on the certifications, the Attorney General and the DNI can direct communications service providers in this country to assist in collection directed against the Government's authorized Section 702 targets.

(U) To ensure compliance with these provisions, Section 702 requires targeting procedures, minimization procedures, and acquisition guidelines. The targeting procedures are designed to ensure that the Government targets non-U.S. persons outside the United States and also that it does not intentionally acquire domestic communications. Moreover, the targeting procedures ensure that targeting of foreign persons is not indiscriminate, but instead targeted at non-U.S. persons outside the United States who are assessed to possess, expected to receive, or are likely to communicate foreign intelligence information. Because Congress understood when it passed the FAA that a targeted non-U.S. person may communicate with, or discuss information concerning, a U.S. person, Congress also required that all collection be governed by minimization procedures that restrict how the Intelligence Community treats any U.S. persons whose communications or information might be incidentally collected and regulate the handling of any nonpublic information concerning U.S. persons that is acquired. Finally, the acquisition guidelines seek to ensure compliance with all of the limitations of Section 702 described above and to ensure that the Government files a traditional FISA application when required.

(U) By approving the certifications submitted by the Attorney General and the DNI, as well as the targeting and minimization procedures, the FISC plays a major role in ensuring that acquisitions under Section 702 are conducted in a lawful manner. The FISC carefully reviews the targeting and

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minimization procedures for compliance with the requirements of both the statute and the Fourth Amendment. The FISC does not, however, confine its review to these documents. As described below, the FISC receives extensive reporting from the Government regarding the operation of, and any compliance incidents involved in, the Section 702 program. When it deems appropriate, the FISC also requires the Government to provide additional descriptive filings and provide testimony at hearings to ensure that the court has a full understanding of the operation of the program. The FISC considers these findings regarding the operation of the program and the Government's compliance annually when it evaluates whether a proposed certification meets all statutory and Constitutional requirements.

(U) Implementation – Targeting and Acquisition

(U) The Government will describe in a classified setting the certification or certifications under which the Government is currently acquiring foreign intelligence information. The Attorney General and the DNI must resubmit certifications to the FISC at least once a year. Using these certifications, the Government "targets" non-U.S. persons reasonably believed to be located outside the United States by "tasking selectors," such as e-mail addresses and telephone numbers, to Section 702 collection. These individual selectors must be assessed to be used by the target to communicate foreign intelligence information of the type covered by the certification.

(U) Thus, as the PCLOB noted, "the Section 702 program is not based on the indiscriminate collection of information in bulk. Instead, the program consists entirely of targeting specific persons about whom an individualized determination has been made." PCLOB Report at 111. The number of individuals targeted under Section 702, however, is substantial, reflecting the critical intelligence provided by this program, but simultaneously a very small percentage of the overseas population, reflecting the fact that targeting is individualized and focused only on specific non-U.S. persons assessed to communicate, receive, or possess foreign intelligence information. For example, the Intelligence Community has reported that approximately 106,469 targets were authorized for collection under the Section 702 program in 2016, a minuscule fraction of the over 3 billion Internet users worldwide.

(U) The NSA initiates all Section 702 collection. NSA's targeting procedures require that there be an appropriate foreign intelligence purpose for the acquisition and that the selector be used by a non-U.S. person reasonably believed to be located outside the United States. To determine the location of a user, an analyst must conduct due diligence to identify information in the NSA's possession that may bear on the location or citizenship status of the potential target. NSA's basis for targeting each selector must be documented, and the documentation for every selector is subsequently reviewed by the Department of Justice (DOJ). FBI and CIA do not initiate Section 702 collection, but may nominate selectors for collection and receive Section 702-acquired communications. Similarly, NCTC does not initiate Section 702 collection, but may receive certain Section 702-acquired communications.

(U) Under Section 702, NSA collects internet and telephony communications. NSA collects Internet communications in two ways: 1) "downstream" (previously referred to as PRISM); and 2) "upstream." Downstream collection involves the acquisition of communications "to or from" a Section 702 selector, such as an email address, where the government acquires data with the

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compelled assistance of the company providing the electronic communication service to the user. In “upstream” collection, NSA obtains communications directly from the Internet backbone, with the compelled assistance of companies that maintain those networks. Until recently, NSA acquired communications “to, from, or about” a Section 702 selector from upstream Internet collection. An example of an “about” email communication is one that includes the targeted email address in the text or body of the email, even though the email is between two persons who are not themselves targets of Section 702 collection. While the FISC was considering the Government’s 2016 submission to renew the Section 702 certifications, NSA reported several earlier, inadvertent compliance incidents related to queries involving U.S. person information in upstream Internet collection. In response to these incidents, the Administration undertook a broad review of its Section 702 program. After considerable evaluation of the program and available technology, the Administration decided to cease the collection of upstream Internet communications that are solely “about” a foreign intelligence target and to limit upstream Internet collection to only those communications that are directly to or from a foreign intelligence target. Accordingly, in March of 2017, the Government amended the renewal certifications, to include submitting to the FISC amended Section 702 targeting and minimization procedures for NSA that authorize the acquisition of communications only to or from a Section 702 target. This change placed NSA’s upstream collection of Internet communications on the same footing as NSA’s upstream collection of telephony calls.

(U) Once acquired, all communications are routed to NSA. CIA, FBI and NCTC only receive a limited portion of the PRISM collection. CIA, FBI and NCTC do not receive the communications acquired through NSA’s Internet or telephony upstream collection.

(U) Implementation – Minimization and Other Protections

(U) Under the statute, each agency must have “minimization procedures.” These are procedures governing the acquisition, retention, and dissemination of communications acquired under Section 702. All agencies’ 2016 Section 702 minimization procedures, including the revised minimization and targeting procedures for NSA, have been released to the public with minimal redactions. The minimization procedures impose strict access controls with respect to the acquired data, regardless of the nationality of the individual to whom it pertains, and require that all personnel who are granted access receive training on the minimization procedures. The minimization procedures require that data be aged off of agency systems after specified periods of time. For example, NSA generally ages off any acquired data that has not been determined to be foreign intelligence information or evidence of a crime within five years of the expiration of the certification. When, despite the Government’s reasonable belief to the contrary, a target is found to be located in the United States (or is discovered to be a U.S. person), the procedures require purging of the collected data, with very limited exceptions requiring Director- level approval. Agencies also appropriately identify and purge data acquired as a result of errors relating to the targeting or minimization procedures.

(U) In addition to access and retention restrictions, the minimization procedures also restrict the ability of analysts to query the data using a query term, such as a name or telephone number, associated with a U.S. person. Communications that include foreign intelligence information about a

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U.S. person that, for example, reveal some sort of homeland nexus of national security matters involving that U.S. person are important to the Intelligence Community. In particular, U.S. person queries of Section 702 collection help us detect and evaluate connections between United States persons and lawfully targeted non-United States persons involved in perpetrating terrorist attacks and other national security threats.

(U) To be clear, queries do not result in the additional collection of any information. Rather, they allow an agency to quickly and effectively locate foreign intelligence information, such as information potentially related to a terrorist plot against the United States, without having to sift through each individual communication that has been collected. Queries of content are only permitted if they are reasonably designed to identify and extract foreign intelligence information. The FBI also may conduct such queries to identify evidence of a crime. Although U.S. person query terms previously could not be used to query NSA's upstream collection of Internet communications, that restriction was recently removed in light of the more restricted nature of NSA's reconfigured upstream Internet collection (discussed above) and NSA's deletion of the vast majority of previously acquired upstream Internet communications. The FISC has repeatedly found that the authority to query to/from communications lawfully acquired pursuant to Section 702 using U.S. person query terms for these purposes is consistent with the provisions of FISA permitting the retention and dissemination of U.S. person information that is determined to be foreign intelligence information or evidence of a crime. The FISC more recently found that the changes NSA made to its upstream Internet collection sufficiently addressed the issues surrounding the use of U.S. person identifiers as query terms in upstream Internet collection. Each set of minimization procedures also includes documentation requirements to allow for oversight of queries by DOJ and the Office of the Director of National Intelligence (ODNI).

(U) There are also additional controls on the dissemination and use of Section 702-acquired information. Before an agency may disseminate information identifying a U.S. person to other entities, the proposed dissemination must meet one of the very few exceptions set forth in the minimization procedures, such as being necessary to understand the foreign intelligence information or assess its importance or evidence of a crime. Like all FISA-acquired information, the statute requires that Section 702-acquired information may only be used in a criminal proceeding with the approval of the Attorney General, Deputy Attorney General, or Assistant Attorney General for National Security. DOJ policy has long extended this same protection to all legal proceedings in the United States. Additionally, notice is given to individuals who are "aggrieved persons" under the statute if the Government intends to use information against them that is either obtained or derived from Section 702 in U.S. legal or administrative proceedings. In 2015, additional restrictions were announced that prohibited the use in a criminal proceeding of any communication to or from, or information about, a U.S. person acquired under Section 702 except for crimes involving national security or several other serious crimes.

(U) Compliance, Oversight, and Transparency

(U) We are committed to ensuring that the Intelligence Community's use of Section 702 is consistent with the law, the FISC's orders, and the protection of the privacy and civil liberties of Americans. The Intelligence Community, DOJ, and the FISC all oversee the use of this authority. This Committee and other Congressional committees also carry out essential oversight, which is

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discussed separately in section IV, below.

(U) First, components in each agency, including Inspectors General, oversee activities conducted under Section 702. This oversight begins with workforce training. NSA, CIA, and FBI all require personnel who target, or nominate for targeting, persons under Section 702 to complete training on the targeting procedures, minimization procedures, and internal agency policies. All Section 702 targeting decisions made by NSA are reviewed at least twice—by an analyst and adjudicator—before tasking, and by NSA compliance personnel and DOJ after tasking. CIA and FBI require multiple layers of review before nominating selectors to NSA for tasking to Section 702.

(U) Agencies using Section 702 authority must report promptly to DOJ and to ODNI incidents of noncompliance with the targeting or minimization procedures or the acquisition guidelines. Attorneys in the National Security Division (NSD) of DOJ routinely review the agencies' targeting decisions. Currently, at least once every two months, NSD and ODNI conduct oversight of NSA, FBI, and CIA activities under Section 702. These reviews are normally conducted on-site by a joint team from NSD and ODNI. The team evaluates and (where appropriate) investigates each potential incident of noncompliance, and conducts a detailed review of agencies' targeting and minimization decisions. Now that NCTC has been authorized to receive raw Section 702-acquired communications, NSD and ODNI will soon begin conducting these oversight reviews at NCTC once every two months. DOJ reports any incident of noncompliance with the statute, targeting procedures, and minimization procedures to the FISC, as well as to Congress. Oversight of Section 702 activities by DOJ and ODNI has been deep in subject matter and broad in scope.

(U) Using the reviews by DOJ and ODNI personnel, the Attorney General and the DNI assess semi-annually, as required by Section 702, compliance with the targeting and minimization procedures and the acquisition guidelines. These assessments, which have been regularly produced to this Committee since the inception of the FAA, conclude that the number of compliance incidents has been small relative to the scope of collection, with no indication of any intentional attempt to violate or circumvent any legal requirements. Rather, the assessments have determined that agency personnel are appropriately directing their efforts at specific non-U.S. persons reasonably believed to be located outside the United States for the purpose of acquiring foreign intelligence information covered by the certifications.

(U) The PCLOB confirmed these findings in its 2014 comprehensive report regarding the Section 702 program. In its report, the Board stated, unanimously, that it was "impressed with the rigor of the government's efforts to ensure that it acquires only those communications it is authorized to collect, and that it targets only those persons it is authorized to target." PCLOB Report at 103. Moreover, the Board identified "no evidence of abuse" of Section 702-acquired information and stated that "the government has taken seriously its obligations to establish and adhere to a detailed set of rules regarding U.S. person communications that it acquires under the program." *Id.* In a declassified 2014 opinion, the FISC similarly noted "[i]t is apparent to the Court that the implementing agencies, as well as [ODNI] and NSD, devote substantial resources to their compliance and oversight responsibilities under Section 702. As a general rule, instances of non-compliance are identified promptly and appropriate remedial actions are taken, to include purging information that was improperly obtained or otherwise subject to destruction requirements under applicable procedures." Declassified Memorandum Opinion and Order (FISC August 26, 2014) at 28,

UNCLASSIFIED

UNCLASSIFIED

<http://www.dni.gov/files/documents/0928/FISC%20Memorandum%20Opinion%20and%20Order%2026%20August%202014.pdf>.

(U) The Intelligence Community and DOJ use the above-described reviews and oversight to evaluate whether changes are needed to the procedures or guidelines and what other steps may be appropriate under Section 702 to protect the privacy of Americans. We also provide the joint assessments, the major portions of the semi-annual reports, and a separate quarterly report to the FISC. We believe, as the FISC and PCLOB have also concluded, that we have established and maintain a strong oversight regime for this authority.

(U) Other courts have reviewed Section 702 in proceedings where Section 702-derived or obtained information has been used against criminal defendants. After receiving notice from the Government, these defendants have challenged the Section 702 collection on both constitutional and statutory grounds. Every court to consider the issue to date has upheld the legality of the Section 702 collection.

(U) The Intelligence Community and DOJ have also made extensive efforts to provide transparency to the public regarding the operation of the Section 702 program, consistent with the need to protect sources and methods. We have declassified and released several FISC opinions regarding the authorization and operation of the Section 702 program, as well as many documents related to the 2016 renewal of Section 702 certifications, including all of the minimization procedures governing the program. These documents are available at ODNI's public website dedicated to fostering greater public visibility into the intelligence activities of the U.S. Government, *IC on the Record*. In 2014, NSA's Director of Civil Liberties and Privacy Office issued an unclassified report regarding NSA's implementation of Section 702. We also declassified extensive information in the course of the PCLOB's review of the Section 702 program.

(U) **III. Other Provisions of the FAA**

(U) While this statement focuses largely on Section 702, the Government believes other FAA provisions also provide critical intelligence tools. In contrast to Section 702, which focuses on foreign targets, Section 704 provides additional protections for collection activities directed against U.S. persons outside of the United States. Prior to the enactment of the FAA, and continuing to this day, section 2.5 of Executive Order 12333 requires the Attorney General to approve the use for intelligence purposes against U.S. persons abroad of "any technique for which a warrant would be required if undertaken for law enforcement purposes," based on a determination by the Attorney General that probable cause exists to believe the U.S. person is a foreign power or an agent of a foreign power. In addition to the Attorney General's approval, Section 704 now requires an order from the FISC, finding that there is probable cause to believe that the targeted U.S. person is a "foreign power, an agent of a foreign power, or an officer or employee of a foreign power," as defined under Title I of FISA, and that the target is a person reasonably believed to be located outside the United States. Like section 2.5 of Executive Order 12333, Section 704 applies in circumstances in which the target has "a reasonable expectation of privacy and a warrant would be required if the acquisition were conducted inside the United States for law enforcement purposes." By requiring the approval of the FISC, Section 704 provides additional civil liberties protections, and we support its reauthorization as part of a larger reauthorization of the FAA.

UNCLASSIFIED

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(U) In addition to Sections 702 and 704, the FAA added several other provisions to FISA. Section 701 provides definitions for the Act. Section 703 allows the FISC to authorize an application targeting a U.S. person outside the United States where the acquisition is conducted in this country. Like Section 704, Section 703 requires a finding by the FISC that there is probable cause that the target is a foreign power, an agent of a foreign power, or an officer or employee of a foreign power. Section 705 allows the Government to obtain various authorities simultaneously. Section 708 clarifies that nothing in the FAA is intended to limit the Government's ability to obtain authorizations under other parts of FISA.

(U) **IV. Congressional Oversight**

(U) Regular and meaningful Congressional oversight of the use of Section 702 and the other provisions of the FAA is an important aspect of the program's implementation. Twice a year, the Attorney General must "fully inform, in a manner consistent with national security," the Intelligence and Judiciary Committees about the implementation of the FAA. In addition to this general obligation, the FAA imposes specific requirements. With respect to Section 702, the report must include copies of certifications and directives and copies of pleadings and orders that contain a significant legal interpretation of Section 702. It also must describe compliance matters, any use of emergency authorities, and the FISC's review of the Government's pleadings. With respect to sections 703 and 704, the report must include the number of applications made, and the number granted, modified, or denied by the FISC.

(U) Section 702 also requires the Attorney General and the DNI to provide to the Intelligence and Judiciary Committees our assessment of compliance with the targeting and minimization procedures and the acquisition guidelines, described above. Title VI of FISA augments the other reporting obligations by requiring a summary of significant legal interpretations of FISA in matters before the FISC or the Court of Review. The requirement extends to interpretations presented in applications or pleadings filed with either court by the Department. In addition to the summary, DOJ must provide copies of FISC decisions that include significant interpretations of the law or novel applications of FISA within 45 days.

(U) DOJ and the Intelligence Community have taken a number of other steps to keep Congress informed. We inform the Intelligence and Judiciary Committees of acquisitions authorized under Section 702. We have reported, in detail, on the results of the reviews and on compliance incidents and remedial efforts. Moreover, we have made all written reports on these reviews available to the Committees.

(U) In addition to both these required and voluntary provisions of information, Congress – to include this Committee – has taken an active role in conducting oversight of FAA authorities through additional hearings and briefings. In 2012, in part due to this extensive oversight, Congress reauthorized the FAA by a bipartisan and overwhelming majority.

UNCLASSIFIED

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(U) Conclusion

(U) Section 702 is a critical foreign intelligence tool that the Intelligence Community uses properly to target non-U.S. persons located outside the United States to acquire information vital to our national security. To protect privacy and civil liberties, this program has operated under strict rules and been carefully overseen by all three branches of the government. We believe that the Intelligence Community's responsible handling of this important collection authority demonstrates our commitment to adhering to our core values while obtaining the information necessary to protect our Nation.

UNCLASSIFIED

Chairman BURR. Thank you, Director Coats.

The Chair would recognize himself now for five minutes of questions.

In 2012, I mentioned in my opening statement, Director of National Intelligence Jim Clapper and Attorney General Eric Holder wrote a letter to the Congressional leadership asking Congress to pass a straight reauthorization of FISA. The September 2012 statement of administration policy also urged the same. This would be to Director Coats and AG Rosenstein: Has the ODNI or the Department of Justice position changed at all since the time of the February 2012 letter?

Director COATS. No. We strongly support the 2012 letter and request.

Chairman BURR. Mr. Rosenstein.

Mr. ROSENSTEIN. We agree 100 percent.

Chairman BURR. Great.

This is to Admiral Rogers and to Director McCabe. Since Congress last authorized this authority in 2012, again, have there been any instances involving a deliberate or intentional compliance violation?

Admiral Rogers.

Admiral ROGERS. Not that I'm aware of.

Chairman BURR. Director McCabe.

Director MCCABE. No, sir.

Chairman BURR. Admiral Rogers, this is to you.

Admiral ROGERS. Yes, sir.

Chairman BURR. If FISA 702 statutory authorities were to end or even be diminished, what would be the impact on our national security?

Admiral ROGERS. I could not generate the same level of insight that the Nation, our friends and allies around the world count on with respect to counterterrorism, counterproliferation. I could not, for example, be able to recreate the insights on the Russian efforts to influence the 2016 election cycle. Without 702, we could not have produced that level of insight.

Chairman BURR. This is a jump ball. April 26, 2017, the Foreign Intelligence Surveillance Court, commonly known as FISC, held that Section 702 certifications, including its targeting and minimization procedures, are lawful both under FISA statute and the Fourth Amendment.

As former Director Comey testified last month, the only reason our laws even require the certification to cover, and I quote, "these non-Americans who aren't in our country" is because of their communications transiting U.S.-based networks and systems. Yet others have suggested imposing a Fourth Amendment warrant requirement on foreigners who are located outside of the United States. This is really NSA and Justice: Would imposing such a warrant requirement impact our national security tools to protect America?

Mr. ROSENSTEIN. He's deferring to me. I'll be happy to take the ball.

Yes, it would, Senator. I think what's important to recognize is that in the absence of Section 702 the Department of Justice and the intelligence community, in every case in which we wanted to

obtain foreign intelligence information, to collect against a particular target we'd be required to obtain a court order that would need to be supported by probable cause.

The consequence of that is, number one, it'd be very time-consuming because these are very thorough investigations and we produce very lengthy documents. In fact, Director McCabe and I spend a fair amount of our time every morning reviewing a stack of documents with our career agents and attorneys, in which they have determined that it's appropriate to seek those orders. So it'd be time-consuming, it would require a significant commitment of resources, and in addition to that it would require a showing of probable cause. And, as you know, the probable cause showing which is required under the Constitution in circumstances in which privacy interests of Americans are at stake and it's required by the Fourth Amendment, that's a relatively higher threshold than we require for foreign intelligence information.

And so we think it's important, Senator, that we not apply that Fourth Amendment constitutional standard to foreigners who are not in the United States.

Chairman BARR. Thank you, Mr. Rosenstein.

Admiral Rogers, this is to you. There's a lot of news reporting, much of it inaccurate, that characterizes Section 702 as a means of targeting U.S. persons. We know that targeting U.S. persons is prohibited, as it is what is termed "reverse targeting." Could you explain and clarify the reverse targeting prohibition? And what does it prevent the IC from targeting and collecting?

Admiral ROGERS. So reverse targeting is designed to preclude our ability to bypass the law. And what do I mean by that? The law is expressly designed to ensure that we are not using this legal framework as a capability to target U.S. persons.

Reverse targeting is the following scenario: Say we're interested in generating insight on U.S. person A. We know that we can't get a Title I, we can't get a FISA warrant. So under the idea of reverse targeting, the theory would be, well, why don't you just target a foreign entity that that U.S. person talks to, and then you'll get all the insights you want on the U.S. person, but you'll have bypassed the court process, you'll have bypassed the entire legal structure. 702 specifically reminds us we cannot do that. We cannot use 702 as a vehicle to bypass other laws or to target U.S. persons.

Chairman BARR. Can you—last question. Can you please clarify for members and for the public, what's meant by "incidental collection"?

Admiral ROGERS. Incidental collection—and the statute itself, if you read the law, the statute acknowledges that in the execution of this framework we will encounter U.S. persons. We call that incidental collection.

That happens under two scenarios. Number one, which is about 90 percent of the time: We are monitoring two foreign individuals, and those foreign entities talk about or reference a U.S. person. The second scenario that we encounter what we call incidental collection is we are targeting a valid foreign individual and that valid foreign individual, a foreign intelligence target, ends up having a conversation with a U.S. person that's not the target of our collection. It's not why we are monitoring it in the first place. We're in-

terested in that foreign target. That happens, of the times we have incidental collection, that scenario happens about 10 percent of the time.

Chairman BURR. And were that incidental collection to happen, do you have a procedure in place in both instances to minimize that?

Admiral ROGERS. We do. The law specifically gives a set of processes that we have to follow. So if we do encounter a U.S. person incidentally in the course of our collection, we ask ourselves several questions. Number one, are we looking at potential criminal activity? If we do that, we have a requirement to report or to inform the Department of Justice and the FBI, and they make the determination if it's illegal or not. We are an intelligence organization, not a law enforcement organization.

The second question we ask ourselves: Is there anything in this conversation that would lead us to believe that we're talking about harm to individuals? In that case, we do report it. If we think we're dealing with something that is criminal or there's harm to individuals, we report it.

Other than that, unless there is a valid intelligence purpose, depending on the authority in a case of 702, we specifically purge the data. We remove it. We don't put it into our holdings. If we don't assess that there's intelligence value and it's a U.S. person, we have to purge the data.

Chairman BURR. Thank you for that.

Vice Chairman.

Vice Chairman WARNER. Thank you, Mr. Chairman.

As I indicated, I've got some questions on another matter and, Director Coats and Admiral Rogers, they're mostly going to be directed at you gentlemen. And thank you for your testimony this morning.

We all know now that in March then-Director Comey testified about the existence of an ongoing FBI investigation into links between the Trump campaign and the Russian government. And there are reports out in the press that the President separately appealed to you, Admiral Rogers, and to you, Director Coats, to downplay the Russia investigation. And now we've got additional reports, and we want to give you a chance to confirm or deny these, that the President separately addressed you, Director Coats, and asked you to, in effect, intervene with Director Comey, again to downplay the FBI investigation.

Admiral Rogers, you draw the short straw. I'm going to start with you. Before we get to the substance of whether this call or request was made, you've had a very distinguished career, close to 40 years. In your experience, would it be in any way typical for a President to ask questions or bring up an ongoing FBI investigation, particularly if that investigation concerns associates and individuals that might be associated with the President's campaign or his activities?

Admiral ROGERS. So today I am not going to talk about theoreticals. I am not going to discuss the specifics of any interaction or conversations I may or may not—

Vice Chairman WARNER. Can you—

Admiral ROGERS. If I could finish, please—that I may or may not have had with the President of the United States. But I will make the following comment. In the three-plus years that I have been the Director of the National Security Agency, to the best of my recollection I have never been directed to do anything I believe to be illegal, immoral, unethical, or inappropriate. And to the best of my recollection, during that same period of service I do not recall ever feeling pressured to do so.

Vice Chairman WARNER. But in your course prior to the incident that we're going to discuss, was it in any regular course where a President would ask you to comment or intervene in any ongoing FBI investigation? Not talking about this circumstance, but is there any prior experience with that?

Admiral ROGERS. I'm not going to talk about theoreticals today.

Vice Chairman WARNER. Well, let me ask you specifically. Did the President—the reports that are out there—ask you in any way, shape, or form to back off or downplay the Russia investigation?

Admiral ROGERS. I'm not going to discuss the specifics of conversations with the President of the United States, but I stand by the comment I just made to you, sir.

Vice Chairman WARNER. Do you feel that those conversations were classified? We know that there was an ongoing FBI investigation.

Admiral ROGERS. Yes, sir.

Vice Chairman WARNER. There are press reports.

Admiral ROGERS. Yes, sir.

Vice Chairman WARNER. I understand your answer. I'm disappointed with that answer, but I may indicate—and I told you I was going to bring this up—there is—

Admiral ROGERS. Yes, sir.

Vice Chairman WARNER. We have facts that there were other individuals that were aware of the call that was made to you, aware of the substance of that call, and that there was a memo prepared because of concerns about that call.

Will you comment at all about the—

Admiral ROGERS. I stand by the comments that I have made to you today, sir.

Vice Chairman WARNER. So you will not confirm or deny the existence of a memo?

Admiral ROGERS. I stand by the comments I have made to you today, sir.

Vice Chairman WARNER. I think it will be essential, Mr. Chairman, that that other individual, who has served our country as well with great distinction, who's no longer a member of the Administration, has a chance to relay his version of those facts.

Again, I understand—

Admiral ROGERS. Yes, sir.

Vice Chairman WARNER [continuing]. Your position, but I hope you'll also understand the enormous need for the American public to know. You've got the Administration saying there's no there there, we have these reports, and yet we can't get confirmation.

I want to go to you, Director Coats. When you appeared before SASC, you said, and I quote, "If called before the investigative committee, I certainly will provide them with what I know and what

I don't know." I have great respect for you. You served on this committee. I remember as well when we confirmed you, and I was proud to support your confirmation, you said that you would cooperate with this committee in any aspects that we request of the Russia investigation.

We now have press reports, and you can lay them to rest if they're not true, but we have press reports of, not once, but twice, that the President of the United States asked you to either downplay the Russia investigation or to directly intervene with Director Comey. Can you set the record straight about what happened or didn't happen?

Director COATS. Well, Senator, as I responded to a similar question during my confirmation and in a second hearing before the committee, I do not feel it's appropriate for me to, in a public session in which confidential conversations between the President and myself—I don't believe it's appropriate for me to address that in a public session.

Vice Chairman WARNER. Gentlemen, I understand——

Director COATS. I stated that before and I——

Vice Chairman WARNER. Well, I thought you also said at SASC, if brought before the investigative committee, you would, quote, "certainly provide them with what I know and what I don't know." We are before that investigative committee.

Director COATS. Well, I stand by my previous statement that we are in a public session here and I do not feel that it is appropriate for me to address confidential information. Most of the information I've shared with the President obviously is directed toward intelligence matters during our Oval briefings every morning at the White House, or most mornings when both the President and I am in town.

But for intelligence-related matters or any other matters that have been discussed, it is my belief that it's inappropriate for me to share that with the public.

Vice Chairman WARNER. Gentlemen, I respect all of your service, and I understand and respect your commitment to the Administration you're serving. We will have to bring forward that other individual about whether the existence of the memo that may document some of the facts that took place in the conversation between the President and Admiral Rogers.

But I would only ask, as we go forward—this is my final comment, Mr. Chairman—that we also have to weigh in here the public's absolute need to know. They're wondering what's going on. They're wondering what type of activities.

We see this pattern that, without confirmation or denial, appears that the President, not once, not twice, but we will hear from Director Comey tomorrow, this pattern where the President seems to want to interfere or downplay or halt the ongoing investigation, not only that the Justice Department's taking on, but this committee's taking on.

And I hope as we move forward on this you'll realize the importance, that the American public deserves to get the answers to these questions.

Thank you, Mr. Coats.

Director COATS. Well, Senator, I would like to respond to that, if I could. First of all, I'm always—I told you and I committed to the committee that I would be available to testify before the committee. I don't think this is the appropriate venue to do this in, given that this is an open hearing, and a lot of confidential information relative to intelligence or other matters—I just don't feel it's appropriate for me to do that in this situation.

And then, secondly, when I was asked yesterday to respond to a piece that I was told was going to be written and printed in the Washington Post this morning, my response to that was, in my time of service which is in interacting with the President of the United States or anybody in his Administration, I have never been pressured, I've never felt pressure to intervene or interfere in any way with shaping intelligence in a political way, or in relationship to an ongoing investigation.

Vice Chairman WARNER. All I'd say, Director Coats, is there was a chance here to lay to rest some of these press reports. If the President is asking you to intervene or downplay—you may not have felt pressure, but if he is even asking, to me that is a very relevant piece of information.

And again, at least in terms of the conversation with Admiral Rogers, I think we will get at least some—another individual's version. But at some point, these facts have to come out.

Thank you, Mr. Chairman.

Chairman BURR. Senator Risch.

Senator RISCH. Well, thank you very much, Mr. Chairman.

Thank you, Senator Coats—excuse me, Director Coats, and Admiral Rogers, for your testimony. With all due respect to my colleague from Virginia, I think you have cleared up substantially your direct testimony that you have never been pressured by anyone, including the President of the United States, to do something illegal, immoral, or anything else. Thank you for that.

Let's go back to—

Director COATS. Thank you, Senator.

Senator RISCH. Let's go back to Section 702, which is what this hearing was supposed to be all about. It's becoming patently obvious, I think, to those of us that work in the intelligence community that we're in a different position than Europe is. Europe, their risks are obviously very high and they're suffering these attacks on a very regular basis, and becoming more regular.

So let's talk about our collection efforts versus the European collection efforts and particularly as it relates to Section 702. And obviously we hear in the media frequently about spats between us and the Europeans regarding intelligence matters. But we all know that there is a robust communication and cooperation between our European friends and ourselves. So I want to talk about it in—I want to talk about 702 in that respect.

Why don't we start, Director Coats, with you and then I'll throw it up for anybody else who wants to comment on this. How important is 702, the continuation of Section 702 and its related parts, to doing what we have been doing as far as helping the Europeans and the Europeans helping us and doing the things that we're doing here in America to see that we don't have the kind of situations that have been recently happening in Europe?

Director Coats, start with you.

Director COATS. Well, having just returned a few weeks ago from major capitals in Europe and discussing this very issue with my counterparts throughout the intelligence communities of these various countries, they voluntarily, before I could even ask the question, expressed extreme gratitude for the ability—for the information we have been able to share with them relative to threats. Numerous threats have been avoided on the basis of collection that we have received through 702 authorities and our notification of them of these impending threats, and they have been deterred or intercepted.

Unfortunately, what has happened just recently, particularly in England, shows that, regardless of how good we are, there are bad actors out there that have bypassed the more concentrated, large attack efforts and taken it, either through inspiration or direction from ISIS or other terrorist groups—have chosen to take violent action against the citizens of those countries.

The purpose of the trip was to ensure them that that we would continue to work and share together. Their collection activities, capabilities, in many cases are good, but in some cases lack the ability that we have. And so this ability to share information with them that helps keep their people safe also is highly valued by them.

But I don't think we should take for granted that, just because Europe has been the recent target of these attacks, that the United States is safe from that. We know through intelligence that there is plotting going on and we know that there's lone-wolf issues and individuals that are taking instructions from ISIS through social media or that, for whatever reason, are copycatting what is happening. And so that threat exists here also.

And let me lastly say that the nations that I've talked to, many of which have been extremely concerned about violating privacy rights, have initiated new procedures and legislation and mandates relative to getting the intelligence agencies better collection, because they think they need it to protect their citizens.

Senator RISCH. Thank you very much.

In just the few seconds that I've got left, Mr. Rosenstein, could you tell me, please—we get a lot of pushback from the privacy people, and we've now heard testimony that there's been no intentional violation over the 10 years. Could you tell the American people what's in store for someone who these guys catch intentionally misusing 702, since you're the highest ranking member of the Department of Justice here?

Mr. ROSENSTEIN. Yes, Senator. I can assure you, Senator, that in Department of Justice we treat with great seriousness any allegations of violations regarding classified information. So if there were a credible allegation that someone had willfully violated Section 702 in a way that was in violation of a criminal law, we would investigate that case and if prosecution were justified we would prosecute it.

I know Director McCabe shares with me that commitment. And we recognize that we have an obligation to the American people to make sure that these authorities are used appropriately and responsibly, that we comply with the Constitution and the laws and

the procedures. And we're committed to devote whatever resources are required to make sure that, if there are willful violations, people are held accountable for them.

Senator RISCH. And this is your commitment, and the Department of Justice's commitment, to the American people?

Mr. ROSENSTEIN. That's correct.

Senator RISCH. Thank you, Mr. Rosenstein.

Mr. ROSENSTEIN. Thank you.

Senator RISCH. Thank you, Mr. Chairman.

Chairman BURR. Senator Feinstein.

Senator FEINSTEIN. Thanks. Thank you, Mr. Chairman.

Just a couple of comments on Section 702. It's a program that I support. It's a program that I believe has worked well. It's a big program. It's an important one. It is a content collection program involving both internet and phone communications, so it can raise concerns about privacy and civil liberties.

In the year 2016, there were 106,469 authorized targets out of 3 billion internet users. That's the ratio. The question of unmasking has been raised. It's my understanding that 1,939 U.S. person identities were unmasked in 2016 based on collection that occurred under Section 702.

So my question is going to be the following, and I'll ask it all together and hopefully you'll answer it. I would like a description of the certification process and the use of an amicus. I would like your response to the fact that—the program sunsets after five years—about raising that sunset versus no sunset. Because of the privacy concerns, it's my belief there should be a sunset—and the use of an amicus, which is currently used as part of the certification process, and whether that should be continued and formalized.

So, Admiral, the program's under your auspices.

Admiral ROGERS. If I could, DOJ is going to be smarter on the amicus piece, please.

Senator FEINSTEIN. Okay.

Admiral ROGERS. Will you take that piece?

Mr. ROSENSTEIN. I'm not sure I am smarter on the amicus piece, Senator. I can tell you this, though, that with regard to the question of unmasking—now, this is actually primarily a question not for the Department. The determination is made by the intelligence agencies if there is a situation where a foreign person has been communicating about an American person, and a decision is made whether or not the identity of the American person is necessary in order for that intelligence to be properly used.

I think what's important for people to recognize, Senator, is that's an internal issue. That is, that unmasking is done internally, you know, within the cloak of confidentiality within the intelligence community. That's a different issue from leaks. In other words, if somebody's identity is disclosed internally because it's relevant for intelligence purposes, because that's the goal of this collection, is to understand—

Senator FEINSTEIN. Mr. Rosenstein, let me just tell you, I just listened to somebody who should have known better talking about unmasking in a political sense, that it's done politically. And that of course is not the case. And so what I'm looking for is the definition of how this is done and under what circumstances.

Mr. ROSENSTEIN. Right. And I think, Senator, that, because that's really a decision made by the IC, the intelligence community, not by the Department, it would be appropriate for them to respond to that.

Admiral ROGERS. I can do that. So, with respect to unmasking, the following criteria apply. First, for the National Security Agency, we define in writing who has the authority to unmask a U.S. person identity. That is 20 individuals in 12 different positions. I am one of the 20 in one of those 12 positions, the Director.

Secondly, we outline in writing what the criteria that will be applied to a request to unmask in a report. And again, part of our process under 702 to protect the identity of U.S. persons, as part of our "minimization procedures," when we think we need to reference a U.S. person in a report, we will not use a name. We will not use an identity. We say, "U.S. Person One, U.S. Person Two, U.S. Person Three."

That report is then promulgated. Some of the recipients of that report will sometimes come back to us and say, "I'm trying to understand what I am reading. Could you help me understand who is Person One or who is Person Two, et cetera?" We apply two criteria in response to their request. Number one, you must make the request in writing. Number two, the request must be made on the basis of your official duties, not the fact that you just find this report really interesting and you're just curious. It has to tangibly tie to your job. And then finally—I said two, but there's a third criterion, and that is the basis of the request must be that you need this identity to understand the intelligence you're reading.

We apply those three criteria, we do it in writing, and one of those 20 individuals then agrees or disagrees. And if we unmask, we go back to that entity who requested it—not every individual who received the report, but that one entity who asked for us. We then provide them the U.S. identity, and we also remind them the classification of this report and the sensitivity of that identity remains in place. By revealing this U.S. person to you, we are doing it to help you understand the intelligence, not—not—so that you can use that knowledge indiscriminately. It must remain appropriately protected.

Senator FEINSTEIN. Thank you.

Director COATS. And, Senator, if I could just add something to that. Given the nature of this issue—and it's a legitimate question that you've asked—I've talked with my colleagues at NSA and CIA, FBI and so forth, suggesting that we might ask our civil liberties and privacy protection agencies to take a look at this, to see if there—Admiral Rogers laid out the procedures. Are these the right procedures, should we be doing something different, would they have recommendations that better protected people from misuse of this? So—and they've all agreed to do that. So I think it's a legitimate issue to follow up on. I've talked to the agency heads about doing so, and they're willing to do it.

Admiral ROGERS. And if I could, I also have an internal review that I have directed. Given all the attention, given the focus, let's step back, let's reassess this and let's ask ourselves, is there anything that would suggest we need to do something different in the process?

Senator FEINSTEIN. Good, good. Thank you.

Mr. ROSENSTEIN. Mr. Chairman, with your permission I'd like to more thoroughly answer the first question the Senator asked, which is that, Senator Feinstein, my understanding is that an amicus was used in 2015, and that decision was made by the court, the Foreign Intelligence Surveillance Court, which has the statutory authority, if the court believes it's appropriate in a particular case, to appoint an amicus. So my understanding is that that was done in 2015. Thank you.

Senator FEINSTEIN. Well, would you feel it would be helpful to make it a part of the regular certification process?

Mr. ROSENSTEIN. Well, my understanding, Senator, is that the statute permits the court to do it if the court believes it's appropriate. So I believe the court has that authority, and I'd leave it to the judges to decide when it's appropriate to exercise that.

Senator FEINSTEIN. Thank you.

Thanks, Mr. Chairman.

Chairman BURR. Senator Rubio.

Senator RUBIO. Thank you all for being here. I understand fully the need of the President of the United States to be able to have conversations with members of the intelligence community that are protected, particularly in a classified setting.

I also understand that the ability of this community to function depends both on its credibility that its work that it's doing is in the national security interest of the United States, and also the importance of its independence—that it is not an extension of politics, no matter which administration is at play.

And the absence of either one of those two things impacts everything we do, including this debate we're having here today. And the challenge that we have now is that, while the folks here with us this morning are constrained in what they can say, there are people that work—apparently work for you that are not, and are constantly speaking to the media about things and saying things.

And it puts the Congress in a very difficult position, because the issue of oversight on both your independence and on your credibility falls on us. I actually think if what is being said to the media is untrue, then it is unfair to the President of the United States. And if it is, then it is—that if it is true, that it is something the American people deserve to know and we as an oversight committee need to know in order to conduct our job.

And so my questions are geared to Director Coats and Admiral Rogers. You have testified that you have never felt pressured or threatened by the President or by anyone to influence any ongoing investigation by the FBI. Are you prepared to say that you have never felt—that you've never been asked by the President or the White House to influence an ongoing investigation?

Director COATS. Well, Senator, I just hate to keep repeating this, but I'm going to do it. I am willing to come before the committee and tell you what I know and what I don't know. What I'm not willing to do is to share what I think is confidential information that ought to be protected in an open hearing. And so I'm not prepared to answer your question today.

Senator RUBIO. Director Coats, I would just say, and with the incredible respect that I have for you, I am not asking for classified

information. I am asking whether or not you have ever been asked by anyone to influence an ongoing investigation.

Director COATS. I understand, but I'm just not going to go down that road—

Senator RUBIO. Okay.

Admiral—

Director COATS [continuing]. In a public forum.

And I also was asked the question, if the special prosecutor called upon me to meet with him to ask his questions. I said I would be willing to do that.

Admiral ROGERS. I likewise stand by my previous comment.

Senator RUBIO. Okay. Well then, in the interest of time let me ask both of you, has anyone ever asked you, now or in the past, this Administration or any administration, to issue a statement that you knew to be false?

Admiral ROGERS. For me, I stand by my previous statement. I've never been directed to do anything in the course of my three-plus years as the director of the National Security Agency—

Senator RUBIO. Not directed. Asked.

Admiral ROGERS [continuing]. That I felt to be inappropriate, nor have I felt pressured to do so.

Senator RUBIO. Have you ever been asked to say something that isn't true?

Admiral ROGERS. I stand by my previous statement, sir.

Senator RUBIO. Director Coats.

Director COATS. I do likewise.

Senator RUBIO. Well, let me ask this of everyone on this panel. Is anyone aware of any effort by anyone, in the White House or elsewhere, to seek advice on how to influence any investigation?

Mr. ROSENSTEIN. My answer is absolutely no, Senator.

Senator RUBIO. No one has anything to add to that?

Admiral ROGERS. I don't understand the question.

Senator RUBIO. The question is, are you aware of any efforts by anyone in the White House or the Executive Branch looking for advice from other members of the intelligence community about how to potentially influence an investigation?

Admiral ROGERS. Are you talking about me? No.

Director COATS. No.

Senator RUBIO. Okay.

Who wants to answer? I'm sorry.

Director MCCABE. I'm not sure I understand the question, but if you're asking whether I'm aware of requests to other people in the intelligence community, I am not.

Senator RUBIO. Seeking advice on how he could potentially influence someone. You're not aware—

Director MCCABE. I'm not aware of it.

Senator RUBIO [continuing]. Of anyone ever saying or reporting that to you?

Director MCCABE. No, sir.

Senator RUBIO. Has anyone ever come forward and said, "I just got a call from someone at the White House asking me what is the best way to influence someone on an investigation"?

Director COATS. I've never received anything.

Admiral ROGERS. I have no direct knowledge of such a call.

Senator RUBIO. It was an allegation made in one of the press reports and that's why I asked.

On a separate topic—I'm sorry.

Mr. Rosenstein.

Mr. ROSENSTEIN. Our confusion, Senator. We just want to make sure we're clear on the question. The answer is no, as I understand it. But I'm not sure I'm familiar with the particular media report that you're referring to.

Senator RUBIO. All right. I'm running out of time. I do want to ask this, because this is important. Did the NSA routinely and extensively and repeatedly violate the rules that were put in place in 2011 to minimize the risk of collection of upstream information?

Admiral ROGERS. Have we had compliance incidents? Yes. Have we reported every one of those to the court? Yes. Have we reported those to our Congressional oversight in Congress? Yes. Have we reported those to the Department of Justice and the Director of National Intelligence? Yes.

Senator RUBIO. Did—under the Obama Administration, was there a significant uptick in efforts—in incidents of unmasking, from 2012 to 2016?

Admiral ROGERS. I don't know that. I'd have to take that for the record, to be honest.

Senator RUBIO. Who would know that?

Admiral ROGERS. We have the data, but I don't know that off the top of my head. I couldn't tell you unmasking on a year-by-year basis for the last five years. I apologize, I just don't know off the top of my head.

Senator RUBIO. Thank you.

Chairman BURR. Senator Wyden.

Senator WYDEN. Thank you very much, Mr. Chairman.

I've noted the conversations you've had with my colleagues with respect to the content of conversations that you may have had with the President. My question is a little different. Did any of you four write memos, take notes, or otherwise record yours or anyone else's interactions with the President related to the Russia investigation?

Director COATS. I don't take any notes.

Senator WYDEN. Let's just get the four of you on the record.

Mr. ROSENSTEIN. Senator, I rarely take notes. I've actually taken a few today. But I am not going to answer questions concerning the Russia investigation. I think it's important for you to understand, when I—

Senator WYDEN. Not on whether you wrote a memo.

Mr. ROSENSTEIN. I'm not going to answer any questions, Senator, about the Russia—

Senator WYDEN. Okay. My time's going to be short.

Whether you wrote a memo, notes, anything?

Director MCCABE. I also am not going to comment on any conversations I may have had or notes taken or not taken relative to the Russia investigation.

Senator WYDEN. Okay.

Admiral ROGERS. And likewise, I take the same position.

Senator WYDEN. Director Coats, on March 23rd you testified to the Armed Services Committee that you were not aware of the President or White House personnel contacting anyone in the intel-

ligence community with a request to drop the investigation into General Flynn. Yesterday, the Washington Post reported that you had been asked by the President to intervene with Director Comey to back off of the FBI's focus on General Flynn. Which one of those is accurate?

Director COATS. Senator, I will say once again I'm not going to get into any discussion on that in an open hearing.

Senator WYDEN. Both of them can't be accurate, Mr. Director.

Mr. Director, as recently as April you promised Americans that you would provide what you called a "relevant metric" for the number of law-abiding Americans who are swept up in the FISA 702 searches. This morning, you went back on that promise and you said that even putting together a sampling, a statistical estimate, would jeopardize national security. I think that is a very, very damaging position to stake out.

We're going to battle it out in the course of this, because there are a lot of Americans who share our view that security and liberty are not mutually exclusive. We can have both. And you rejected that this morning. You went back on a pledge, and I think it is damaging to the public. Now, let me—

Director COATS. Senator, could I answer the question?

Senator WYDEN. Mr. Director, my time is short and I want to ask you about one other—

Director COATS. Well, I would like to answer your question.

Senator WYDEN. Briefly.

Director COATS. What I pledged to you in my confirmation hearing is that I would make every effort to try to find out why we were not able to come to a specific number of collection on U.S. persons. I told you I would consult with Admiral Rogers. I told you I would go to the National Security Agency to try to determine whether or not I was able to do that.

I went out there. I talked to them. They went through the technical details. There were extensive efforts on the part of, I learned, on the parts of NSA to try to come to, to get you an appropriate answer. We were not able to do that.

Senator WYDEN. Mr. Director, respectfully, that's not what you said. You said, and I quote, "We are working to produce a relevant metric."

Now, let me go to my other question—

Director COATS. We were, but we were not able to do that, to achieve it.

Senator WYDEN. You told—

Director COATS. Working to do it is different than doing it.

Senator WYDEN. You told the American people that even a statistical sample would be jeopardizing America's national security. That is inaccurate and I think detrimental to the cause of ensuring we have both security and liberty.

Now, here's my other question. We are trying to sort out—

Senator MCCAIN. Can the witness respond?

Senator WYDEN [continuing]. Who are the targets, who are the targets of a 702 investigation. Director Comey gave three different answers in a hearing a month ago, and I think it would be very helpful if you would tell us who in fact is a target of these investigations.

I want to go after serious foreign threats, but we don't know as of now, with Director Comey having given three different answers, who the targets are.

Mr. Director.

Director COATS. Well, I can't speak for Director—former Director Clapper. Targets, as I understand, are non-U.S. persons. Foreign individuals are the targets in terms—702 is directed and prohibited from directing targets on U.S. persons.

Senator WYDEN. My time is up. I will tell you, Director Comey gave three answers. He finally said: "I could be wrong, but I don't think so. I think it's confined to counterterrorism, to espionage." And finally he said he didn't think a diplomat could be targeted.

So we need you all, in addition to protecting the liberties of the American people, to tell us who the targets are.

Thank you, Chairman.

Director COATS. Well, I would like to respond to that by saying some of those targets are classified, highly classified.

Senator WYDEN. I understand that.

Director COATS. Some of those targets, by revealing those names of those targets, release the methods that we use, and then it's turned against us and could cost the lives—or put some of our agents in significant—

Senator WYDEN. Director Comey listed a number of targets, which is why there's confusion. He said that on the record. We need you to tell us on the record as well, consistent with protecting sources and methods.

Chairman BURR. Senator Collins.

Senator COLLINS. Thank you, Mr. Chairman.

Director Coats, first let me thank you for a very cogent explanation of Section 702 and the fact that it cannot be used to target any person located in the United States, whether or not that person is an American. I think there's a lot of confusion about Section 702, and I appreciate your clear explanation this morning.

Director COATS. Thank you.

Senator COLLINS. I have a question for each of you that I would like to ask and I want to start with Admiral Rogers. Admiral Rogers, did anyone at the White House direct you on how to respond today or were there discussions of executive privilege?

Admiral ROGERS. Have I asked the White House is it their intent to invoke executive privilege? Yes. The answer I gave you today reflects my answer, no one else's.

Senator COLLINS. Director Coats.

Director COATS. My answer is exactly the same.

Senator COLLINS. Deputy Attorney General Rosenstein?

Mr. ROSENSTEIN. I have not had any communications with the White House about invoking executive privilege today.

Senator COLLINS. Director McCabe.

Director MCCABE. I have not had any conversations with the White House about executive privilege today either.

Senator COLLINS. Admiral Rogers, in January the FBI, the CIA, and NSA jointly issued an Intelligence Committee Assessment on Russian involvement in the presidential elections. You've testified today that the IC relied in part on 702 authorities to support its conclusion that the Russians were involved in trying to influence

the 2016 elections. Can you provide us with an update on NSA's further work in this area?

Admiral ROGERS. In terms of the Russian efforts largely?

Senator COLLINS. Yes.

Admiral ROGERS. Yes, ma'am. We continue to focus analytic and collection effort trying to generate insights as to what the Russians and others are doing, particularly with respect to efforts against U.S. infrastructure, U.S. processes like elections. We continue to generate insights on a regular basis.

If my memory is right, I testified before the SSCI that we did the open threat assessment, and in that hearing, which I think was the 11th of May, I reiterated, we continue to see the similar activity that we identified and highlighted in the January report. Those trends continue. Much of that activity continues.

Senator COLLINS. It's my understanding that President Obama requested the report that was issued in January. Is that correct?

Admiral ROGERS. Yes, ma'am. He asked for a consolidated single input from the IC as to the question, did the Russians or did they not attempt to influence the U.S. election?

Senator COLLINS. So could you explain the difference between the request from President Obama for that unclassified assessment and the allegations that President Trump requested that you publicly report on whether or not there was any intelligence concerning collusion between the Russians and the members of the Trump campaign, President Trump's campaign?

Admiral ROGERS. So I apologize, I guess I'm confused by the question. Again, I'm not going to comment on any interactions with the President. I just don't feel that that is appropriate. As I previously testified, I stand by that report.

Senator COLLINS. Let me ask a broader question that I truly am trying to get a handle on. And that is, how does the intelligence community reach a decision on whether or not to comply with a request that comes from the President of the United States?

Obviously, you report to the President of the United States. And I'm interested in what process you go through to decide whether or not to undertake a task that's been assigned by the President, by any President.

Admiral ROGERS. So, off the top of my head, I would say we comply unless we have reason to believe that we are being directed to do something that is illegal, immoral or unethical.

Senator COLLINS. Thank you.

Admiral ROGERS. In which case, we will not execute that.

Chairman BURR. Senator Heinrich.

Senator HEINRICH. Director McCabe, did Director Comey ever share details of his conversations with the President with you? In particular, did Director Comey say that the President had asked for his loyalty?

Director MCCABE. Sir, I'm not going to comment on conversations the Director may have had with the President. I know he's here to testify in front of you tomorrow. You'll have an opportunity to ask him those—

Senator HEINRICH. I'm asking you, did you have that conversation with Director Comey?

Director MCCABE. And I've responded that I'm not going to comment on those conversations.

Senator HEINRICH. Why not?

Director MCCABE. Because—for two reasons. First, as I mentioned, I'm not in a position to talk about conversations that Director Comey may or may not have had with the President.

Senator HEINRICH. I'm not asking you that. I'm asking about conversations that you had with Director Comey.

Director MCCABE. And I think that those matters also begin to fall within the scope of issues being investigated by the special counsel and wouldn't be appropriate for me to comment on today.

Senator HEINRICH. So you're not invoking executive privilege, and obviously it's not classified. This is the oversight committee. Why would it not be appropriate for you to share that conversation with us?

Director MCCABE. I think I'll let Director Comey speak for himself tomorrow in front of this committee.

Senator HEINRICH. We certainly look forward to that. But I think your unwillingness to share that conversation is an issue.

Director Coats, you've said as well that it would be inappropriate to answer a simple question about whether the President asked for your assistance in blunting the Russia investigation.

I don't care how you felt. I'm not asking whether you felt pressured. I'm simply asking, did that conversation occur?

Director COATS. And once again, Senator, I will say that I do believe it's inappropriate for me to discuss that in an open session.

Senator HEINRICH. You realize—and obviously this is not releasing any classified information. But you realize how simple it would simply be to say, "No, that never happened"? Why is it inappropriate, Director Coats?

Director COATS. I think conversations between the President and myself are for the most part—

Senator HEINRICH. You seem to apply that standard selectively.

Director COATS. No, I'm not applying it selectively. I'm saying I don't think it's appropriate—

Senator HEINRICH. You could clear an awful lot up by simply saying that it never happened.

Director COATS. I don't share—I do not share with the general public conversations that I have with the President or many of my colleagues within the Administration that I believe should not be shared.

Senator HEINRICH. Well, I think your unwillingness to answer a very basic question speaks volumes.

Director COATS. It's not a matter of unwillingness—

Senator HEINRICH. Mr. Rosenstein—

Director COATS. Senator. It's a matter—

Senator HEINRICH. It is a matter of unwillingness.

Director COATS. It's a matter of how I share it and whom I share it to. And when there are ongoing investigations, I think it's inappropriate to—

Senator HEINRICH. So you don't think the American people deserve to know the answer to that question?

Director COATS. I think the investigations will determine that. And your part of the investigation—

Senator HEINRICH. Mr. Rosenstein, did you know, when you wrote the memo that was used as the primary justification for firing Director Comey, that the Administration would be using it as the primary justification?

Mr. ROSENSTEIN. Senator, as I know you're aware, I have—there are a number of documents associated with me that are in the public record. The memorandum I wrote concerning Director Comey is in the public record.

The order appointing the special counsel is in the public record. The press release I issued accompanying that order is in the public record. And a written version of the statement that I delivered to 100 United States Senators—

Senator HEINRICH. Were you aware that it would be the primary justification for his firing by the—

Mr. ROSENSTEIN. Pardon me, Senator—100 United States Senators and 435 Congressmen is in the public record. I answered many questions in the closed briefings of the 100 Senators...

Senator HEINRICH. But you're not answering this question.

Mr. ROSENSTEIN. And as I explained in those briefings, Senator, I support Mr. McCabe on this. We have a special counsel who is investigating, now responsible for the Russia.—

Senator HEINRICH. Okay. At this point you filibuster better than most of my colleagues, so I'm going to move on to another question and say that, given that the President stated that the FBI Director—that his firing was in response to investigations into Russia, which he made very clear in Lester Holt's interviews, you've talked with both the President and the Attorney General about this firing.

In light of Mr. Sessions' recusal, what role did the Attorney General play in that firing? And was it appropriate for him to write the letter that he wrote in this case?

Mr. ROSENSTEIN. I'm not trying to filibuster, Senator. I think I only took about 30 seconds. But I am not going to comment on that matter. I'm going to leave it to Special Counsel Mueller to determine whether that is within the scope of his investigation. And I believe that it's appropriate for Mr. McCabe and me to do that, and we recognize—

Senator HEINRICH. Okay, so you can't comment on the recusal and what's in, inside and outside the scope of that recusal?

Senator MCCAIN. Mr. Chairman, we ought to let the witness answer the question.

Mr. ROSENSTEIN. I'm sorry. Your specific question is what's in the recusal, and my understanding is the recusal you're referring to is also in the public record, and I believe it speaks for itself.

Senator HEINRICH. Thank you, Mr. Chair.

Chairman BURR. Senator Blunt.

Senator BLUNT. Director McCabe, on May the 11th when you were before this committee, you said that there has been no effort to impede the Russian investigation. Is that still your position?

Director MCCABE. It is, but let me clarify, Senator. I think you're referring to the exchange that I had with Senator Rubio. And my understanding—at least my intention in providing that answer was whether or not the firing of Director Comey had had a negative impact on our investigation. And my response was then, and is now, that the FBI investigated and continues to investigate, and now of

course under the rubric of the special counsel, the Russia investigation in an appropriate and unimpeded way, before Director Comey was fired and since he's been gone.

Senator BLUNT. Well, I think, as I recall that conversation, it was a discussion about whether there were plenty of resources, whether the funding was adequate. And what you were reported to have said—I haven't looked at the exact transcript, but I have looked at the news article—was that you were aware of no effort to impede the Russia investigation.

Director MCCABE. We did talk about resource issues and whether or not we had asked for additional resources to pursue the investigation. And I believe my response at the time was we had not asked for additional resources, and that we had adequate resources to pursue the investigation. That was true then. It's still true today.

Senator BLUNT. And you would characterize your quote as “no effort to impede the Russian investigation” as still accurate?

Director MCCABE. That's correct.

Senator BLUNT. On the 702 issue, when the FBI wants to follow up on or pursue a U.S. person in or outside the United States, what court do you go to get that to happen? Do you go to the FISA Court as well?

Director MCCABE. If we are seeking collection under 702?

Senator BLUNT. No, if—well, if you're—how do you relate to 702? Do you ever seek collection under 702?

Director MCCABE. Sure, yes, we do. So when—well, so let me step back just a minute. So, of course, when the FBI seeks electronic surveillance collection on a U.S. person, we go to the FISA Court and get a Title I FISA order to do so.

If we have an open, full investigation on a foreign person in a foreign place and the collection is for the purpose of collecting foreign intelligence, we can nominate that person or that, as we refer to it internally, the selector, whether it's an e-mail address or that sort of thing, we can nominate that for 702 coverage. We convey that nomination to the NSA and they pursue the coverage under their authority.

Senator BLUNT. But you would be the person that would pursue coverage for a U.S. person, either here or outside the United States?

Director MCCABE. That's correct, Senator.

Senator BLUNT. You the FBI.

Director MCCABE. We are the U.S. person agency, that's right.

Senator BLUNT. And, Admiral Rogers, Senator Feinstein mentioned that last year 1,139 U.S. persons were, the phrase we're using now, unmasked for some purpose. Is that a number you agree with?

Admiral ROGERS. It's in the 2016 ODNI-generated transparency report. From memory, the number is actually 1,934, from memory. I could be wrong.

Senator BLUNT. I'm sorry, so I misheard. But 1,900. What would the number have been in 2015?

Admiral ROGERS. To be honest, I don't know. I'd have to take that one for the record. I do know that we didn't start with the transparency commitment that we made, partnering with the DNI,

we didn't start that until the latter end of 2015. So the 2015 data that's been published as a matter of public record is a subset of the entire calendar year; 2016 is the first calendar year where we have published all the data for the entire year.

Senator BLUNT. Director Coats, do you have any information on that?

Director COATS. Well, I've seen the number. I don't recall what it was, and I just asked my staff if we have it—

Senator BLUNT. All right. I guess what I'm asking, and you can take this for the record, is was there an increase in 2016? Did you have significantly more requests, based on your subset in 2015, happen in 2016 than you had had—

Admiral ROGERS. I don't know off the top of my head. We'll take it for the record. But I will say this: 702 collection has continued. The amount of total collection has increased, generally, every year. It's more and more impactful for us. It generates more and more value.

Senator BLUNT. And when you have—when 702 generates information that would indicate there was a U.S. person involved in criminal activity, what do you do with that information?

Admiral ROGERS. We report it to either, to DOJ and the FBI, because we're not a criminal organization.

Senator BLUNT. And what—what do you do if you get that information at DOJ, Mr. Rosenstein? Information from a 702 collection that clearly indicates there's a crime involving a U.S. person.

Mr. ROSENSTEIN. I hesitate only because that's actually an FBI issue, so I would defer to Mr. McCabe.

Senator BLUNT. All right.

Mr. McCabe.

Director MCCABE. Sure. So we take that referral, and if that's a U.S. person we begin to build an investigation aiming towards Title I FISA collection.

Senator BLUNT. With adequate protections for U.S. persons in that entire chain—

Director MCCABE. Of course.

Senator BLUNT [continuing]. Of transmission of—

Director MCCABE. Of course.

Senator BLUNT [continuing]. Of material?

Director MCCABE. That's right.

Senator BLUNT. Thank you, Chairman.

Chairman BURR. Senator King.

Senator KING. Thank you, Mr. Chairman.

First on 702, like Senator Feinstein, I want to express my support for this important tool for our intelligence agencies. I do have a concern, which we can discuss perhaps in closed session, about the process by which American names which are incidentally collected are then queried. I'm concerned by the distinction between query and search and where we run into the Fourth Amendment.

It strikes me as bootstrapping to say we collected it legally under 702 and then we can go and look at these American persons, and I believe that the Fourth Amendment imposes a warrant requirement in between that step, which is not present in the present process. We can discuss that at greater length.

Mr. McCabe, I'm puzzled by your refusal to answer Senator Heinrich's question about a conversation you may have had with Director Comey. What's the basis of your refusal to answer that question?

Director MCCABE. Sir, as I stated, I think, first, I can't sit here and tell you whether or not those conversations that you're referring to—

Senator KING. Why not? Do you not remember them?

Director MCCABE. No, no. I'm sorry, sir. I can't—I don't know whether conversations along the lines that you've described fall within the purview of what the special counsel is now investigating.

Senator KING. Is there some prohibition in the law that I'm not familiar with that you can't discuss an item in—that you've been asked directly a question?

Director MCCABE. It would not be appropriate for me, sir, to discuss issues that are potentially within the purview of the special counsel's investigation.

Senator KING. And that's the basis of your refusal to answer this question?

Director MCCABE. Yes, sir, that and knowing, of course, that Director Comey will be sitting behind this table tomorrow.

Senator KING. So it's your position that the special counsel's entitled to ask you questions about this, but not an oversight committee of the United States Congress?

Director MCCABE. It is my position that I have to be particularly careful about not stepping into the special counsel's lane, as they have now been authorized by the Department of Justice to investigate these matters.

Senator KING. I don't understand why the special counsel's lane takes precedence over the lane of the United States Congress in an investigative and oversight committee. Can you explain that distinction? Why does the special counsel get deference and not this committee?

Director MCCABE. Sir, I'd be happy to—

Senator KING. Is there some legal basis for the distinction?

Director MCCABE. I would be happy to take that matter back, to discuss it more fully with my general counsel and with the Department. But right now that's the—

Senator KING. On the record, I would like a legal justification for your refusal to answer the question today, because I think it's a straightforward question. It's not involving discussions with the President; it's involving discussions with Mr. Comey.

Gentlemen, Director Coats and Admiral Rogers, I think you testified, Admiral Rogers, that you did discuss today's testimony with someone in the White House?

Admiral ROGERS. I said I asked did the White House intend to invoke executive privileges associated with any interactions between myself and the President of the United States.

Senator KING. And what was the answer to that question?

Admiral ROGERS. To be honest, I didn't get a definitive answer, and both myself and the DNI are still talking—

Senator KING. Then I'll ask both of you the same question. Why are you not answering these questions? Is there an invocation by

the President of the United States of executive privilege? Is there or not?

Admiral ROGERS. Not that I'm aware of.

Senator KING. Then why are you not answering?

Admiral ROGERS. Because I feel it is inappropriate, Senator.

Senator KING. What you feel isn't relevant, Admiral. What you feel isn't the answer. The answer is, why are you not answering the questions? Is it an invocation of executive privilege? If there is, then let's know about it. If there isn't, answer the questions.

Admiral ROGERS. I stand by the comments that I've made. I'm not interested in repeating myself, sir. And I don't mean that in a—contentious way.

Senator KING. Well, I do mean it in a contentious way.

Admiral ROGERS. Yes, sir.

Senator KING. I don't understand why you're not answering our questions. You can't—when you were confirmed before the Armed Services Committee, you took an oath: Do you solemnly swear to give the committee the truth, the full truth and nothing but the truth, so help you God?

Admiral ROGERS. I do.

Senator KING. You answered yes to that.

Admiral ROGERS. And I've also answered that those conversations were classified, and it is not appropriate in an open forum to discuss those classified conversations.

Senator KING. What is classified about a conversation involving whether or not you should intervene in the FBI investigation?

Admiral ROGERS. Sir, I stand by my previous comments.

Senator KING. Mr. Coats, same series of questions. What's the basis for your refusal to answer these questions today?

Director COATS. The basis is what I've previously explained. I do not believe it is appropriate for me to get into it—

Senator KING. What's that basis? I'm not satisfied with "I do not believe it is appropriate" or "I do not feel I should answer." I want to understand a legal basis. You swore that oath to tell us the truth, the whole truth, and nothing but the truth. And today, you are refusing to do so. What is the legal basis for your refusal to testify to this committee?

Director COATS. I'm not sure I have a legal basis, but I'm more than willing to sit before this committee during its investigative process in a closed session and answer your question.

Senator KING. Well, we're going to be having a closed session in a few hours. Do you commit to me that you're going to answer these questions in a direct and unencumbered way?

Director COATS. Well, that closed session you're going to have in a few hours involves the staff going over the technicalities of a number of these issues and doesn't involve us. But I—

Senator KING. Well, is it your testimony that when you are before this committee in a closed session, you will answer these questions directly and unequivocally and without hesitation?

Director COATS. I plan to do that. But I do have to work through the legal counsel at the White House relative to whether or not they're going to exercise executive privilege.

Senator KING. Admiral Rogers, will you answer these questions in a closed session?

Admiral ROGERS. I likewise respond as the DNI has. I certainly hope that that is what happens. I believe that's the appropriate thing. But I do have to acknowledge, because of the sensitive nature and the executive privilege aspects of this, I need to be talking to the general counsel and the White House. I hope we come to a position where we can have this dialogue. I welcome that dialogue, sir.

Senator KING. I hope so, too. And I would just add in conclusion that both of you testified you had never been pressured under three years. I would argue that you have waived executive privilege by in effect testifying as to something that didn't happen. And I believe you opened the door to these questions. And it is my belief you are inappropriately refusing to answer these questions today.

Thank you, Mr. Chairman.

Chairman BURR. Before I turn to Senator Lankford, let me say that the Vice Chairman and I have had conversations with Acting Attorney General Rosenstein when the special counsel was named; and, as I had shared with the members of this committee prior to that, that as we carried out an investigation there would come a point in time, either with an investigation that was currently ongoing at the FBI or, if there was a special counsel, with the special counsel, where there would be avenues that this committee could not explore.

And it was my hope that already the Vice Chair and I would have had that conversation with the special counsel. We have not. We have made the request. We intend to have it. And I think that both of us anticipated that we would reach this point at some point in the investigation. We are there, where there are some things that will fall into the special counsel and/or an active investigation.

Vice Chairman.

Vice Chairman WARNER. Let me just say, though, that at this point we've not had that conversation with Mr. Mueller. We've not been waved off on any subject, and the way I'm hearing all of you gentlemen is that Mr. Mueller has not waved you off from answering any of these questions. Is that correct?

Director COATS. I've had no conversations with Mr. Mueller. I've been out of the country for the last nine days—

Vice Chairman WARNER. I would just—

Director COATS [continuing]. So I haven't had an opportunity to talk to him.

Vice Chairman WARNER. Because if you've not have questions waved off with Mr. Mueller, I think, frankly—and I understand your commitment to the Administration—but that Senator King, Senator Heinrich and my questions deserve answers, and at some point the American public deserves full answers.

Chairman BURR. I'm going to ask Mr. Rosenstein to address that.

Mr. ROSENSTEIN. Thank you, Mr. Chairman. And I'm sensitive to your desire to keep our answers brief, and my full answer actually would be very lengthy. But my brief answer, from my perspective at the Department of Justice—and I've been there for 27 years, and Mr. McCabe also is a career employee of the Department of Justice—our default position is that when there's a Justice Department investigation we do not discuss it publicly.

That's our default rule, so nobody needs to—

Vice Chairman WARNER. Is that the rule for the President of the United States as well?

Mr. ROSENSTEIN. I don't know what—

Vice Chairman WARNER. Because that is what the questions are being asked about, reports that nobody has laid to rest here, that the President of the United States has intervened directly in an ongoing FBI investigation. And we've gotten no answer from any of you.

And frankly, we've at least heard from Director Coats and Admiral Rogers that they've not been asked to recuse an answer because of Director Mueller. And I don't understand why we can't get that answer.

Mr. ROSENSTEIN. So, I'm not answering for Director Rogers or Director Coats. I'm answering for Director McCabe and myself with regard to the Department of Justice.

Chairman BURR. Senator Lankford.

Senator LANKFORD. Director McCabe, can I ask you, do you feel confident at this point the FBI is fully cooperating with the special counsel for any requests in communication and setting up of the coordination between the offices for documents, work products, insights, anything the special counsel as they're trying to get organized and get prepared for the investigations they're taking on? Is everyone in the FBI fully cooperating with special counsel?

Director MCCABE. Absolutely, sir. I'm absolutely confident of that. We have a robust relationship with the special counsel's office, and we are supporting them with personnel and resources in any way they request.

Senator LANKFORD. Thank you.

Admiral Rogers, this spring the NSA decided to stop doing "about" queries. That was a long conversation that's happened there. It's now come out into public about that conversation, that that was identified as a problem. The court agreed with that and that has been stopped.

What I need to ask you is who first identified that as a problem?

Admiral ROGERS. The National Security Agency did.

Senator LANKFORD. Okay. So how did you report that? Reported that to who? How did that conversation go once you identified, we're uncomfortable with this type?

Admiral ROGERS. So in 2016, I had directed our Office of Compliance, let's do a fundamental baseline review of compliance associated with 702.

Senator LANKFORD. Okay.

Admiral ROGERS. We completed that effort, and my memory is I was briefed on something like October the 20th. That led me to believe the technical solution that we put in place is not working with the reliability that's necessary here. I then, from memory, went to the Department of Justice and then on to the FISA Court at the end of October—I think it was something like the 26th of October—and we informed the court: we have a compliance issue here and we're concerned that there's an underlying issue with the technical solution we put in place.

We told the court we were going to need some period of time to work our way through that. The court granted us that time. In return, the court also said: We will allow you to continue 702 under

the 2016 authorizations, but we will not—will not reauthorize 2017 until you show us that you have addressed this.

We then went through an internal process, interacted with the Department of Justice as well as the court, and by March we had come to a solution that the FISA Court was comfortable with. The court then authorized us to execute that solution and also then granted us authority for the 2017 702 effort.

Senator LANKFORD. So you reported initially to the court, this is an issue, or the court initially came to you and said, we have an issue?

Admiral ROGERS. I went to the court and said, we have an issue.

Senator LANKFORD. And the court said, we agree, we have a problem as well?

Admiral ROGERS. Check.

Senator LANKFORD. And then it got held up, went through the process of review, and then the court has now signed off on the other 16?

Admiral ROGERS. That is correct.

Senator LANKFORD. So how does this harm your collection capabilities, to be able to not do the “about” collections?

Admiral ROGERS. So I acknowledged that in doing this we were going to lose some intelligence value. But my concern was I just felt it was important; we needed to be able to show that we are fully compliant with the law. And the technical solution we had put in place I just didn’t think was generating the level of reliability. And as a result of that, I said we need to make the change.

I will say this, and the FISA Court’s opinion also says the same thing. I also told the court at the time, if we can work that technical solution in a way it generates greater reliability, I would potentially come back to the Department of Justice and the court to recommend that we reinstitute it. And in fact the court acknowledged that in their certification.

Senator LANKFORD. When you say greater reliability, tell me what you mean by that?

Admiral ROGERS. Because it was generating errors. Our Office of Compliance highlighted the specific number of cases in 2016. And I thought to myself, clearly it’s not working as we think it is. We were doing queries unknowingly to the operator in a handful of situations against U.S. persons. And I just said, hey, that is not in accordance with the intent of the law.

Senator LANKFORD. Yes. Clearly it’s not only the intent; it’s the actual statute itself that—

Admiral ROGERS. Correct, right.

Senator LANKFORD [continuing]. That we protect U.S. persons unless this is foreign directed.

Admiral ROGERS. Yes, sir.

Senator LANKFORD. So what I’m hearing from you is the accountability system worked.

Admiral ROGERS. Yes, sir.

Senator LANKFORD. That the issue rose up, we’re collecting, we do have information on U.S. persons. We don’t want to get that information. Immediately, the process started going through to be able to stop it. The court then put the final stop on it. It was corrected, and then that’s now cleared.

Admiral ROGERS. Yes, sir. And, in fact, we're purging the data as well. Not only have we stopped doing it, but we're purging the data that we had collected under the previous authorization.

Senator LANKFORD. So the issue on 702—most Oklahomans that I interact with don't know the term "702." But it—if I asked them, should we collect information on terrorist organizations and terrorists overseas who are planning to carry out attacks on us and our allies, they don't hesitate. They say absolutely we should do that.

Now, they don't want collection on themselves and their mom, but they absolutely want us to be able to target terrorists. And so the issue that I think we talk about when we talk about 702 on this dais, is a normal conversation back home that if we miss something internationally, everyone says: I thought we were doing this. Why aren't we?

So I fully appreciate the civil liberties conversation, the privacy questions. Those are things I'm also passionate about, and it's very interesting for me to be able to hear from you that you're passionate about and the NSA is passionate about, to make sure that we're not collecting on Americans.

So I appreciate that, and in this case when it comes out in the public media that this has occurred, it actually shows the system itself worked. When there was a query going on that was collecting on Americans, it was stopped immediately, data's purged. But we're still continuing to be able to target on threats internationally, and I do appreciate that.

Thank you. I appreciate and yield back the time.

Chairman BURR. Senator Manchin.

Senator MANCHIN. Thank you, Mr. Chairman.

I want to thank all four of you for your service, and you all are held at the highest—I think, the highest regards by your colleagues and your peers, and I think that speaks volumes of the character of all four of you, and I appreciate that very much.

We have a committee here, which I'm so proud to be serving on. I'm brand new on the committee. This is my first time at this, and I don't think there's a person up here that doesn't want to find out the facts and the truth and be able to go back home and explain to the Democrat and Republican colleagues and no matter what political persuasion that we have gotten the facts, we got it from our intel, which we truly appreciate and respect the quality of the job and the work that you do, and this is our findings.

We're having a hard time getting there, as you can tell, and I respect where you all are coming from. And I hope you could understand that, sooner or later, we're going to have to—there has to be one element of this government that the public can look at and say: this is not politically motivated. This is not a witch hunt.

No one's trying to harm anybody. We just want to do the business of our government and our country and do the best that we can for that and make sure that they have the confidence in the people that they've put at the head and have elected. That's what we're trying to get to.

Today's been very difficult, me sitting here listening to some of the answers and an inability to answer some of the questions. If the Intelligence Committee in the Senate cannot get answers we know in an open setting like this, are these answers that we're ask-

ing, the questions that were simply asked today, would they be given into a classified intel setting that we would have? Could you answer differently than what you're giving us in open session? I think, Director Coats, you said that you would be able to answer differently.

Director COATS. I think I've made that very clear.

Senator MANCHIN. Yes.

Director COATS. I've tried to——

Senator MANCHIN. Admiral Rogers, would you be——

Admiral ROGERS. And likewise, I certainly hope so.

Senator MANCHIN. Mr. Rosenstein, would you?

Mr. ROSENSTEIN. Senator, speaking for Mr. McCabe and myself, you know, we have been involved in managing the criminal investigation. And so I would ask that, as Chairman Burr suggested, it's really appropriate for Director Mueller, since we've turned over control of that investigation to him, to make the determination in the first instance about what we can and can't speak about. So I would encourage you to use Mr. Mueller as your point person as to whether or not it's appropriate to reveal that information.

Senator MANCHIN. Well, let's just say that the questions that were asked to Mr. McCabe, I think they weren't anything on the investigation side. It was asked pretty personal and directly. Could you answer differently in a classified setting, sir?

Director MCCABE. I would reiterate the DAG's comments that at this point, with the special counsel involved, it would be appropriate for the committee to have an understanding with the special counsel's office as to where those questions would go.

But I would also point out that, as we have historically when we are investigating sensitive matters in which operational security is of utmost importance, members of the intelligence community typically come and brief the leadership, Congressional leadership, on sensitive investigative matters.

We have done so. I have done so. Director Comey has done so prior to the appointment of the special counsel. And some of the questions that you have asked this morning were addressed in those closed, very restricted, very small settings.

Senator MANCHIN. Well, let me say this—that, if it would be the desire of the Chairman and Vice Chairman, if we could, since we have a classified hearing scheduled for 2:00 this afternoon, would you all make yourselves available, since it doesn't linger on? There's been a lot of questions, a lot of anticipation and a lot of built-up anxiety, if you will. I think you could really help an awful lot of us clear the day up, if you will.

Chairman BURR. If I could address the Senator's question, this afternoon is set with technical people to walk us through 702. Rest assured that we will take the first available opportunity to have people back in closed session to address those questions that they can address.

And, hopefully prior to that, the Vice Chair and I would have an opportunity to meet with Director Mueller to determine whether that fits within the scope of his current investigation, and we will do that.

Senator MANCHIN. Well, Mr. Chairman, the only thing I'm saying is that I know that you can tell by the intensity of the questions

here that there's a lot of concerns right now. And we have both Director Coats and Admiral Rogers who are willing to say in a classified hearing that they would be able to answer differently. That's the only reason I was bringing that up. And we have it this afternoon. I would hope that would maybe be considered.

Let me ask a question. Does the President support Section 702, reauthorization of the FISA and expanded authority?

Director COATS. Absolutely.

Senator MANCHIN. Everyone?

Director COATS. Full support.

Senator MANCHIN. Full support there.

Did the President ask or was he given any specific intelligence or info concerning the Russian active measures in the 2016 presidential election? Was he briefed on that? Did he ask for that briefing, or did—is it an automatic briefing that you give?

Admiral Rogers.

Director COATS. Well all that took place before I was Director.

Admiral ROGERS. I will say yes, he was briefed on the results of the intelligence community assessment. I was part of that in January, prior to his assuming his duties. He and I have discussed as well the specifics of that assessment subsequent, after he had become the president and assumed the duties.

Senator MANCHIN. Let me just say, just in finishing up, I just would hope that you all, with your expertise and all of your knowledge, would help us put closure to this sooner or later. I mean, we need your help. We need your assistance, we really do.

And this is a committee that I think will take the facts as you give them to us and decipher that, and come up with some appropriate action and a final report, which is I think what the public is looking for. We can't do that without your assistance. Thank you.

Director COATS. And, Senator, I fully understand that statement. And, as the Chairman mentioned, the procedures he's going to put in place relative to when we hold that hearing and the relationship it is to the official investigation that's going on by Director Mueller will dictate when and how we do that.

Senator MANCHIN. I think we need you in the SCIF sooner than later.

Thank you.

Chairman BURR. Senator Cotton.

Senator COTTON. Thank you, gentlemen. I want to talk about the import of Section 702 to our national security. Admiral Rogers, I'll direct most of these questions to you as the subject matter expert on the panel on signals intelligence from foreign threats, though I might turn to some of our lawyers for legal questions.

Does Section 702, Admiral Rogers, allow you to collect information on U.S. citizens?

Admiral ROGERS. As intentionally targeted individuals? No.

Senator COTTON. Yes. Intentionally target them.

Admiral ROGERS. No.

Senator COTTON. Does it allow you to target foreigners to do what's called reverse targeting of U.S. citizens, knowing those U.S. citizens are in communications?

Admiral ROGERS. No, it does not.

Senator COTTON. Does it allow you to collect information on foreigners who are on U.S. soil?

Admiral ROGERS. No, 702—

Senator COTTON. It doesn't?

Admiral ROGERS [continuing]. Is outside the United States.

Senator COTTON. So you can collect information on an ISIS terrorist in Syria; and he comes to the United States and you can no longer collect information on his cell phone or his e-mail address?

Admiral ROGERS. We're a foreign intelligence organization. We coordinate with the FBI. But, yes, sir, we don't do internal, domestic collection, broadly.

Senator COTTON. Mr. Rosenstein, do foreigners have constitutional rights?

Mr. ROSENSTEIN. When they're in the United States, Senator, different rules apply. And that's why I think it's important for people to understand that Section 702 applies only in circumstances where it's a foreign national outside the United States. If they're inside the United States, we would need to rely on other provisions of FISA to do that collection. So, yes, we can do it, but we need to apply different rules. And Mr. McCabe, as the Director indicated, is responsible for that.

Senator COTTON. Mr. McCabe, what happens when an ISIS terrorist comes from Syria to the United States and Director Rogers, or Admiral Rogers, can no longer use Section 702 to monitor his electronic communications?

Director MCCABE. Admiral Rogers' folks notify mine and then we work together to pursue coverage under different elements of the FISA statute.

Senator COTTON. I'm sure you work as hard as you can to make sure that is absolutely seamless, but it does seem to me that Section 702, because it's limited to foreigners on foreign soil without targeting any U.S. persons anywhere, goes the extra mile to protect the constitutional rights of American citizens and even the supposed constitutional rights of foreigners when they come on U.S. soil.

That's one reason why I support the permanent extension of Section 702, and I introduced legislation to that effect yesterday with the support of all seven Republicans on this committee.

Tom Bossert, the Counterterrorism and Homeland Security Adviser to the President, writes in today's New York Times about our legislation: "The Trump Administration supports this bill without condition." Admiral Rogers, is that your position?

Admiral ROGERS. Could you repeat that again? I apologize, sir.

Senator COTTON. "The Trump Administration supports this bill without condition."

Admiral ROGERS. Yes.

Senator COTTON. On a scale of 1 to 10, how enthusiastic would you be if this bill passed? You can go over 10, and be excessively enthusiastic.

[Laughter.]

Admiral ROGERS. I would be ecstatic that we would be in a position to continue to generate significant insights for this Nation's security.

Senator COTTON. So you'd dial it straight up to 11?

Admiral ROGERS. Yes, sir.

Senator COTTON. Okay.

Director Coats.

Director COATS. My level's about 100.

Senator COTTON. Mr. Rosenstein.

Mr. ROSENSTEIN. Senator, I'm not familiar with the rating system. I do think it's very important.

Senator COTTON. Director McCabe.

Director MCCABE. I'm at 11.

Senator COTTON. Director Coats, you had an exchange earlier with Senator Wyden about the efforts to estimate and declassify the number of persons who might be subject to incidental collection under Section 702. This is when you have a lawful 702 order, but someone does in fact communicate with an American citizen.

It's my understanding that it would be virtually impossible to do so in a way that wouldn't further infringe on the rights of American citizens. Is that correct?

Director COATS. Well that's—yes, and that's one of the central reasons why I came to the conclusion. But the main reason I came to the conclusion is that it just is not conceivably possible. We could go through the procedures, we could shift hundreds of people to go over and breach the rights of hundreds if not thousands of American citizens to determine—of individuals, to determine whether or not they are American citizens or not. But we still, having done that, could not get to an accurate number, the number that Senator Wyden was trying to get us to.

My pledge to him was I would go out there, try to fully understand why it was we couldn't get that. There will be detailed discussions on that on the closed session with the staff and the technicians from both NSA and from Senate staff, here and others, relative to all of the efforts that have been made to try to answer the question.

And as I said in my statement, even if we were to take people off their regular jobs and say, get on this issue, even if we could put other measures in place, we still would not be able to come up. It's hard to explain how difficult this is or why this is the case, but that is what is going to be discussed in the closed session, because all this is classified information, this afternoon. I assume the staff of members, all the members here, will be there.

But my pledge was to do the best I could to try to get to some answer. And the result was we couldn't get to an answer, number one; and number two, trying to get to an answer would totally disrupt the efforts of the agency.

Now, you know, you might be able to make the case, let's hire a thousand more people and get to the answer, if you knew that you would get to the answer. Admiral Rogers has told me—I hope he doesn't mind me saying this—that if someone out there knows how to get to it, he's welcome to have them come out and tell NSA how to do it.

But everybody says, you can get to the number, it's easy, there's all kinds of agencies out there that can do it. I think you might welcome the advice if they wanted to do that. It really raises the question of why there has to be an exact number.

Senator COTTON. Well, if we're going to hire a thousand new people, I'd sooner them focus on terrorists and foreign intelligence services than violating the privacy rights of American citizens.

My time is expired.

Chairman BURR. Senator Harris.

Senator HARRIS. Thank you.

Admiral Rogers, in response to the question from Senator Manchin, you it appears felt free to discuss the conversations you've had with the President in January about Russian active measures. Can you share with this committee how you're determining which conversations you can share and which you don't feel free to share?

Admiral ROGERS. Ma'am, the fact that we briefed the President previously, both went up to New York and previously, is a matter of public record.

Senator HARRIS. So if it's a matter of public record, then you feel free to discuss those conversations?

Admiral ROGERS. If it's not classified. You can keep trying to trip me up—

Senator HARRIS. Is the—

Admiral ROGERS. Senator, if you could, could I get to respond, please, ma'am?

Senator HARRIS. No, sir. No, no.

Admiral ROGERS. Okay.

Senator HARRIS. Are you saying that if it is classified you will not discuss it? And then my follow-up question obviously would be, do you believe that discussion of Russian active measures is not the subject of classified information?

Admiral ROGERS. I stand by my previous comments.

Senator HARRIS. Thank you.

Mr. Rosenstein, when you appointed a special counsel on May 17th, you stated, quote: "Based upon the unique circumstances, the public interest requires me to place this investigation under the authority of a person who exercises a degree of independence from the normal chain of command."

The order you issued along with that statement provides that 28 CFR 600.4 through 10 were applicable. Those are otherwise known as the special counsel regulations. Is that correct?

Mr. ROSENSTEIN. Yes, Senator.

Senator HARRIS. And it states that the special counsel, quote, "shall not be subject to the day-to-day supervision of any official of the Department." However, the regulations permit you, as Acting Attorney General for this matter, to override Director Mueller's investigative and prosecutorial decisions under specified circumstances. Is that correct?

Mr. ROSENSTEIN. Yes, Senator.

Senator HARRIS. And it also provides that you may fire or remove Director Mueller under specified circumstances. Is that correct?

Mr. ROSENSTEIN. Yes.

Senator HARRIS. And you indicated in your statement that you chose a person who exercises a degree of independence, not full independence, from the normal chain of command. So my question is this: In December of 2003, then-Attorney General John Ashcroft recused himself from the investigation into the leak that led to the

disclosure of Valerie Plame's identity as a CIA officer. The Acting Attorney General at the time was Jim Comey. He appointed a special counsel, Patrick Fitzgerald, to take over the matter.

In a letter dated December 30th of 2003, Mr. Comey wrote the following to Mr. Fitzgerald, quote: "I direct you to exercise the authority as special counsel independent of the supervision or control of any officer of the Department." In a subsequent letter dated February 6, 2004, Mr. Comey wrote to clarify the earlier letter, stating that his delegation of authority to Mr. Fitzgerald was, quote, "plenary." Moreover, it said that "my," quote, "conferral on you of the title of special counsel in this matter should not be misunderstood to suggest that your position and authorities are defined or limited by 28 CFR Part 600." Those are the special counsel regulations we discussed.

So would you agree, Mr. Rosenstein, to provide a letter to Director Mueller similarly providing that Director Mueller has the authority as special counsel, quote, "independent of the supervision or control of any officer of the Department," and ensure that Director Mueller has the authority that is plenary and not, quote, "defined or limited by the special counsel regulations?"

Mr. ROSENSTEIN. Senator, I'm very sensitive about time and I'd like to have a very lengthy conversation and explain that all to you. I tried to do that—

Senator HARRIS. Can you give me a yes or no answer, please?

Mr. ROSENSTEIN [continuing]. In the closed briefing.

Well, it's not a short answer, Senator. The answer is—

Senator HARRIS. It is. Either you are willing to do that or not—

Mr. ROSENSTEIN. Well—

Senator HARRIS [continuing]. As we have precedent in that regard.

Mr. ROSENSTEIN. But the—

Senator MCCAIN. Mr. Chairman, they should be allowed to answer the question.

Mr. ROSENSTEIN. It's a long question you pose, Senator, and I fully appreciate the import of your question, and I'll get to the answer.

My quibble with you is, Pat Fitzgerald is a very principled, very independent person. I have a lot of respect for him. Pat Fitzgerald could have been fired by the President because he was a United States attorney. Robert Mueller cannot because he's protected by those special counsel regulations.

So although it's theoretically true that there are circumstances where he could be removed by the Acting Attorney General, which for this case at this time is me, your assurance of his independence is Robert Mueller's integrity and Andy McCabe's integrity and my integrity, and those regulations—

Senator HARRIS. Sir, if I may, the greater assurance is not that you and I believe in Director Mueller's integrity, which I have no question about Mr. Mueller's integrity. It is that you would put in writing an indication, based on your authority as the Acting Attorney General, that he has full independence in regards to the investigations that are before him. Are you willing or are you not willing to give him the authority to be fully independent of your ability statutorily and legally to fire him?

Mr. ROSENSTEIN. He is—he has the——

Senator HARRIS. Yes or no, sir?

Mr. ROSENSTEIN. He has the full independence as authorized by those regulations and, Senator, as I said——

Senator HARRIS. Are you willing to do as has been done before——

Chairman BURR. Would the Senator suspend? The Chair is going to exercise its right to allow the witnesses to answer the question, and the committee is on notice to provide the witnesses the courtesy, which has not been extended all the way across, extend the courtesy for questions to get answered.

Senator HARRIS. Mr. Chairman, respectfully, I would——

Chairman BURR. Mr. Rosenstein, will you——

Senator HARRIS [continuing]. Point out that this witness has joked, as we all have, at his ability to filibuster.

Chairman BURR. The Senator will suspend.

Mr. Rosenstein, would you like to thoroughly answer the question?

Mr. ROSENSTEIN. Thank you, Mr. Chairman.

Senator, I am not joking. The truth is I have a lot of experience with these issues and I could give—I could speak to you for a very long time about it, and I'm sympathetic—I appreciate the five-minute limit. That's not my limit.

But the answer is this originated, as you may know, with the independent counsel statute. And I worked for an independent counsel, and I worked in the Department during the independent counsel era, when independent counsels were appointed by authorization of the Senate, they were appointed by Federal judges, and they had essentially the authority equivalent to the Attorney General.

That statute sunsetted and the majority of members of this body concluded that that was appropriate because they did not want special—independent counsels who were 100 percent independent of the Department of Justice. That was a determination made by the legislature.

Now, I know the folks at the Department who drafted this regulation under Janet Reno and they drafted it to deal with this type of circumstance. And the idea was that there would be some circumstances where, because of unusual events, it was appropriate to appoint somebody from outside the Department, not somebody like Pat Fitzgerald, who was a U.S. Attorney who could be fired, but somebody from outside the Department, who could be trusted to conduct this investigation independently and could be given an appropriate degree of independence.

Now, under the regulation he has, I believe, adequate authority to conduct this investigation. And your ultimate check, Senator, is, number one, the integrity of the people involved in the investigation, but, number two, the fact that if he were overruled or if he were fired we would be required under the regulation to report to the Congress.

And so I believe that's an appropriate check. And so, while I realize that theoretically anybody could be fired and so there's a potential for undermining an investigation, I am confident, Senator, that Director Mueller, Mr. McCabe, and I and anybody else who may fill

those positions in the future will protect the integrity of that investigation. That's my commitment to you, and that's the guarantee that you and the American people have.

Chairman BURR. Senator Cornyn.

Senator HARRIS. So is that a no?

Chairman BURR. Senator Cornyn.

Senator CORNYN. Well, there seems to be one thing we all agree on, at least so far, based on the questions and the comments, and that is that 702 is an important tool for the intelligence community and one that needs to be preserved. And I agree with Senator Cotton that it should be extended without a sunset provision, as currently written. So it's good to have one, one thing we agree on.

But I want to ask Director Coats, and perhaps, Admiral Rogers, if you want to comment on this as well: as I understand the framework of 702, it is to intentionally not target American citizens. It is to intentionally target foreign persons and to not collect information from American citizens, except by way of incidental collection. And I think you've described, Admiral Rogers, the extensive procedures that the law requires and that NSA practices have in place to minimize the access of anybody in the intelligence community to that U.S. person. And indeed you've talked about purging incidental collection that was made in the course of the 702 investigation.

So it strikes me, Director Coats—the question that Senator Wyden has asked you, and it's come up several times—to intentionally target American citizens in order to generate a number is just the opposite of what the structure of 702 provides, because the whole idea is to not collect, not to be able to gather information about American citizens, except in the course, incidental course of collecting information against a foreign intelligence target. Is that a fair statement?

Director COATS. That's fair in my mind. And it was an essential piece of the information, of fact, that caused me to come to the conclusion that this would do just exactly what you said. You're breaching someone's privacy to determine whether or not they are an American person.

Senator CORNYN. To generate a list for Congress.

Director COATS. It potentially could, yes, generate a list for Congress. That wasn't the only basis on which we made the decision, but that was an essential basis.

Senator CORNYN. Thank you.

I want to ask a little bit more about the minimization procedures and the importance of those and a little bit about unmasking of U.S. persons' names that Admiral Rogers and others, Director Coats, you've talked about. You've explained the process and the elaborate procedures that are in place to make sure that this is not done accidentally or casually. And I think that's very important to reassuring the American people that in the collection of foreign intelligence we are extraordinarily protective of the privacy of U.S. citizens who might be incidentally collected against. And so to me the minimization procedures are very important. The internal policies of the NSA, when it comes to collecting foreign intelligence that happens to incidentally impact American citizens is absolutely critical to this balance between security and individual privacy.

Perhaps this is a question for Mr. Rosenstein, though, and maybe Director McCabe. If someone is to use the unmasking process for a political purpose, is that potentially a crime?

Mr. ROSENSTEIN. Yes, Senator.

Senator CORNYN. And, Director McCabe perhaps or Deputy Attorney General Rosenstein, for somebody to leak the name of an American citizen that is unmasked in the course of incidental collection, to leak that classified information, is that also potentially a crime?

Mr. ROSENSTEIN. Yes, I think that's a most significant point, Senator. I think it's important for people to understand. Unmasking is done in the course of ordinary, legitimate intelligence gathering, when the identity of the person on the other end of the phone, the other end of the message, may be relevant to understand the intelligence significance of the communication.

Leaking is a completely different matter. Leaking is a crime. Disclosing information to somebody without a legitimate purpose, need to know that information, that will be prosecuted in appropriate circumstances. And there have been cases where we've been able to determine there was a willful violation of Federal law, a disclosure that was not authorized, and prosecutions have been brought and will be brought.

Senator CORNYN. And, Mr. Rosenstein, not to pick on you or Director McCabe, but I think there's some confusion when we talk about, generically about Russian investigations. We've described the role of the special counsel, which I think you've discussed in great detail. But that's primarily to investigate potential criminal acts and counterintelligence activities, is it not?

Mr. ROSENSTEIN. The answer to that is yes. The idea of the Russian investigation, that has much broader significance, I know, to many of you than the piece that Director McCabe and I are referring to and the piece that Director Mueller is investigating.

Senator CORNYN. Right. Well, that's enormously helpful, at least to me, because when people speak generically of the Russian investigation, I think they're also including things like our responsibility as the Intelligence Committee to do oversight of the intelligence and of the potential countermeasures we might undertake to deal with the active measures campaign of the Russian government, which were clearly documented in the intelligence community assessment.

But by my count there are multiple committees of the United States Senate, including the Judiciary Committee on which I serve, which has different jurisdiction and oversight responsibilities. It's our job to do the investigation and write legislation. We're not the FBI, we're not the special counsel, we're not the Department of Justice.

And I'm afraid in the conversation that we've been having here people have been conflating all of those and those are very distinct and importantly distinct functions.

Thank you.

Chairman BURR. Senator Reed.

Senator REED. Well, thank you very much, Mr. Chairman.

Director McCabe, on May 11th you testified, quote, "Director Comey enjoyed broad support within the FBI, and still does to this

day.” And you added that you hold him in the absolute highest regard. Is still that the case?

Director MCCABE. It is, sir.

Senator REED. Thank you.

Director McCabe, I’m trying to understand the rationale for your unwillingness to comment upon your conversations with Director Comey. First, you have had, I would presume—and correct me if I’m wrong—conversations with Mr. Mueller. You’ve had those conversations?

Director MCCABE. Yes, sir.

Senator REED. You’re fully familiar with the scope of the investigation, since you’ve dealt with not only Mr. Mueller, but also with—

Director MCCABE. I am, sir, but I think it’s important to note that Mr. Mueller and his team are currently in the process of determining what that scope is. And much in the way that Senator Cornyn just referred to, the FBI maintains a much broader responsibility to continue investigating issues relative to potential Russian counterintelligence activity and threats posed to us from our Russian adversaries.

So determining exactly where those lanes in the road are, where does Director Mueller’s scope overlap into our pre-existing and long-running Russian responsibilities, is somewhat of a challenge at the moment. And that is why I am trying to be particularly respectful of his efforts and not to take any steps that might compromise his investigation.

Senator REED. But, getting back to your rationale for not commenting on the conversation between you and Mr. Comey, it seems to me that what you’ve said is that either that is part of a criminal investigation or likely to become part of a criminal investigation, the conversation between the President of the United States and Mr. Comey, and therefore you cannot properly comment on that. Is that accurate?

Director MCCABE. That’s accurate, sir.

Senator REED. What about the conversations between Director Coats and Admiral Rogers with the President of the United States? Is that likely to become or is part of an ongoing criminal investigation?

Director MCCABE. I couldn’t comment on that, sir. I’m not familiar with that, and it wouldn’t be—for the same reasons it’s not appropriate for me to comment on Director Comey’s conversations, I certainly wouldn’t comment on those that I’m further away from.

Senator REED. Mr. Rosenstein, are you aware of the possibility of an investigation of the conversations that Director Coats and Admiral Rogers have had with the President?

Mr. ROSENSTEIN. My familiarity with that, Senator, is limited to what I read in the newspaper this morning and what we heard here today.

Senator REED. Director Coats, have you had any contact with the special prosecutor or any—

Director COATS. I have not.

Senator REED. Have you been advised by any of your counsels, private or public, that this conversation that you had with the President could be subject to a criminal investigation?

Director COATS. No, I have not.

Senator REED. Admiral Rogers, same question.

Admiral ROGERS. For the last question, no, I have not.

Senator REED. Let me just return again to the points that I think Senator King made very well, which is this unwillingness to comment on the conversation with the President, but to characterize it in a way that you didn't feel pressured, yet refusing to answer very specific and non-intelligence-related issues that I don't see how it would impact on the classification and our status whether or not you were specifically asked by the President to do anything. Do you still maintain that you can't comment on whether you were asked or not?

Director COATS. Nothing has changed since my initial response.

Admiral ROGERS. I stand by my previous answer.

Senator REED. I just must say, the impression that I have is that, if you could say that, you would say that.

Thank you. I have no further questions.

Chairman BURR. Senator McCain.

Senator MCCAIN. Well, gentlemen, you're here at an interesting time. It's funny how sometimes events run together. This morning's Washington Post, "Top intelligence official told associates Trump asked him if he could intervene with Comey on FBI Russia probe." It goes into some detail. I'm sure you've read the article. And it's more than disturbing. Obviously, if it's true that the President of the United States was trying to get the Director of National Intelligence and others to abandon an investigation into Russian involvement, it's pretty serious.

I also understand the position that you're in, because it is classified information and yet here it is on this morning's Washington Post in some detail. I'm sure you've read it.

So I guess if I understand you right, Director Coats, it is that in a closed session you are more than ready to discuss this situation. Is that correct?

Director COATS. I would hope we'd have the opportunity to do that.

Senator MCCAIN. Well, I hope we can provide you with that opportunity.

You know, it just shows what kind of an Orwellian existence that we live in. I mean, it's detailed, as you know from reading the story, as to when you met, what you discussed, et cetera, et cetera. And yet, here in a public hearing before the American people we can't talk about what was described in detail in this morning's Washington Post. Do you want to comment on that, Dan?

Director COATS. Are you asking me to comment on the integrity of the Washington Post reporting? I guess I've been around town long enough—

Senator MCCAIN. It's pretty detailed.

Director COATS. I guess I've been around town long enough to say not take everything at face value that's printed in the Post. I served on the committee here and often saw that information that we had discussed had been reported, but that it wasn't always accurate.

But I think this is—the response that I gave to the Post was that I did not want to publicly share what I thought were private con-

versations with the President of the United States, most of them, almost all of them, intelligence-related and classified. I didn't think it was appropriate to do so in an open—for the Post to report what it reported or to do that in an open session.

Senator MCCAIN. Well, it's an unfortunate situation that you're sitting there because it's classified information and this morning's Washington Post describes in some detail, not just outline but times and dates and subjects that are being discussed. And I'm certainly not blaming you, but it certainly is an interesting town in which we exist.

Director COATS. Just because it's published in the Washington Post doesn't mean it's now unclassified.

Senator MCCAIN. But unfortunately, whether it's classified or not, it's now out to the world, which is obviously not your fault, but it describes dates and times and who met with whom.

And so, well, do you want to tell us any more about the Russian involvement in our election that we don't already know from reading the Washington Post?

Director COATS. I don't think that's a position that I'm in. I do know that there are ongoing investigations. And I do know that we continue to provide all the relevant intelligence we have to enable those investigations to be carried out with integrity and with knowledge.

Senator MCCAIN. Well, it must be a bit frustrating to you, in protecting what is clearly sensitive information, and then to read all about it in the Washington Post. You have my sympathy, and I expressed that at your confirmation hearing, doubting your sanity.

So, Admiral, have you got anything to say about it?

Admiral ROGERS. No, sir, other than, boy, some days I sure wish I was an ensign on the bridge of that destroyer again.

Senator MCCAIN. I can understand that. I feel the same way.

Mr. Rosenstein.

Mr. ROSENSTEIN. Senator, I can't speak for anybody else, but I'm proud to be here. I'm proud to be here with Director McCabe and I'm sure he feels the same way.

Director MCCABE. I do.

[Laughter.]

Senator MCCAIN. Whatever that might mean.

Thank you, Mr. Chairman.

Chairman BURR. Thank you, Senator McCain.

The Chair is going to recognize Senator Wyden for one question on 702.

Senator WYDEN. Thank you very much, Mr. Chairman. I appreciate the courtesy.

This one, Director Coats, I'd like a yes or no answer on. Can the government use FISA Act Section 702 to collect communications it knows are entirely domestic?

Director COATS. Not to my knowledge. It would be against the law.

Senator WYDEN. Thank you, Mr. Chairman.

Chairman BURR. Senator Warner.

Vice Chairman WARNER. Again, I want to thank all the witnesses. But I come out of this hearing with more questions than when I went in.

Gentlemen, you were both willing to somehow characterize your conversations with the President that you didn't feel pressure, but you wouldn't share the content. In the case of Admiral Rogers, we will have an independent third party that will at least provide some level of contemporaneous description of that conversation and obviously why there was concern enough to commit that to writing.

I'm pretty frustrated that there is this deference to the special prosecutor, even though the special prosecutor has not talked to you. I'm concerned that the Deputy Attorney General, also deference to the special prosecutor. But there doesn't seem to be—in this committee, and the Chairman I have committed to making sure that we appropriately de-conflict.

What we don't seem to have is the same commitment to find out whether the President of the United States tried to intervene directly with leaders of our intelligence community and ask them to back off or downplay. You've testified to your feelings response. Candidly, your feelings response is important, but the content of his communication with you is absolutely critical.

And I guess I would just say the President is not above the law. If the President intervenes in a conversation and intervenes in an investigation like that, would that not be subject of some concern, Mr. Rosenstein?

Mr. ROSENSTEIN. Senator, if anybody obstructs a Federal investigation, it would be a subject of concern. I don't care who they are. And I could commit to you, if you're looking for commitment from Mr. McCabe and from me, that if there is any credible allegation that anybody seeks to obstruct a Federal investigation, it will be investigated appropriately, whether it's by Mr. McCabe, by me, by the special counsel. That's our responsibility and we'll see to it.

Vice Chairman WARNER. Well, I thank the Chairman for the fact that we've been working on this in a bipartisan way. We will ultimately have to get to the content of those conversations.

Thank you.

Chairman BARR. Director Coats, I know you've got to go. Give me 90 more seconds, if you could.

And this question probably to you, Admiral Rogers. Have our partners globally used 702 intelligence to stop a terrorist attack?

Admiral ROGERS. Yes, sir, and if we were to lose the 702 authority I would fully expect leaders from some of our closest allies to put out one loud scream.

Chairman BARR. And in most cases didn't they take credit for our intelligence?

Admiral ROGERS. They don't publicly talk about where it comes from, but we acknowledge NSA is a primary provider of insights—

Chairman BARR. I just wanted to get it on the record there—

Admiral ROGERS. Yes, sir. A host of nations rely on it.

Chairman BARR [continuing]. That this is a global asset—

Admiral ROGERS. Yes.

Chairman BARR [continuing]. That the war on terror has in 702.

Admiral ROGERS. Yes, sir.

Chairman BARR. Now—

Director COATS. Mr. Chairman, if I could just take—

Chairman BARR. Yes, sir?

Director COATS [continuing]. The time you were trying to protect for me for my next appointment to just say, following—and I just want to repeat—following my interaction with my contemporaries in a number of European countries, they are deeply, deeply grateful to us, for the information derived from 702 has saved, what they said, literally hundreds of lives.

Chairman BURR. Well, certainly the committee is privy to those instances in a lot of cases and we're grateful for that.

Gentlemen, I want to thank you for your testimony. But before we adjourn, I would ask each of you to take a message back to the Administration. You're in positions whereby you're required to keep this committee fully and currently informed of intelligence activities. In cases where the sensitivity of those activities would not be appropriate for the full committee or open session, there's a mechanism that you may use to brief the appropriate parties. It's sometimes, often, referred to as the "Gang of Eight notification briefing." And I think without exception everybody at the table has utilized that tool before.

Congressional oversight of the intelligence activities of our government is necessary and it must be robust. Thus the provisions of this unique briefing mechanism. Given the availability of that sensitive briefing avenue, at no time should you be in a position where you come to Congress without an answer. It may be in a different format, but the requirements of our oversight duties and your agencies demand it.

With that, again I thank you for being here.

This hearing's adjourned.

[Whereupon, at 12:38 p.m., the hearing was adjourned.]

